SUPREME COURT, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

Bob E. Fewell and Holdingsco, Inc.

Petitioners

vs.

Mike Pickens, Insurance Commissioner
for the State of Arkansas

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Due Process Clause of the United States Constitution prohibits a state agency from avoiding state statutory notice requirements by acting as judge and jury on the issue of whether an agreement, to which the state agency was a party, was breached, forming the basis for the entry of a permanent *ex parte* court order of receivership.

II.

Whether the Due Process Clause of the United States Constitution requires a meaningful opportunity to be heard on the issue of a domestic insurance company's right to contest its company's placement into permanent receivership by an Insurance Commissioner.

LIST OF PARTIES

The parties to this Proceeding are as follows:

The Petitioners are Bob E. Fewell and Holdingsco, Inc., Intervenors at the trial court and Appellants before the Arkansas Supreme Court.

The Respondent is Mike Pickens, the Commissioner of the Arkansas Insurance Department, Petitioner before the trial court and Appellee before the Arkansas Supreme Court.

Also a party below, American Investors Life Insurance Company, Inc., the Respondent before the trial court.

CORPORATE DISCLOSURE STATEMENT

Holdingsco, Inc. is an Arkansas corporation. No parent or publicly held company owns more than 10% of the stock of Holdingsco, Inc. Bob E. Fewell owns 100% of Holdingsco, Inc.

Holdingsco, Inc. owns 100% of the stock of American Investors Life Insurance Company, Inc. No other parent or publicly held company owns more than 10% of the stock of American Investors Life Insurance Company, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

OPINIONS DELIVERED BELOW

The opinion of the Arkansas Supreme Court is reported at 344 Ark. 368, 39 S.W.3d 447 (2001) and is printed in its entirety at Appendix A hereto. The Arkansas Supreme Court's unpublished order denying Petitioners' Petition for Rehearing, entered May 3, 2001 is printed at Appendix B. The unreported July 11, 2000 Permanent Injunction and Order Appointing Receiver by the Circuit Court of Pulaski County, Arkansas, the Honorable John Plegge, enjoining the business of American Investors Life Insurance Company, Inc., and appointing a receiver for the management of the affairs of the same is printed at Appendix C. The unreported Order of August 4, 2001 allowing intervention but refusing to set aside the Permanent Injunction and Order Appointing Receiver by Judge Plegge is printed at Appendix D. The unreported Order of October 6, 2001, approving the Statement of Proceedings of the Respondent to complete the record as to the events transpiring off the record is printed at Appendix E.

GROUNDS FOR THE INVOCATION OF JURISDICTION OF THE COURT

This Petition arises from a four to three decision of the Arkansas Supreme Court whereby the Court affirmed a Permanent Injunction and Order Appointing Receiver for the takeover of the assets and management of American Investors Life Insurance Company, Inc. The Court's decision was announced on April 5, 2001. Petitioners herein, Bob E. Fewell and Holdingsco, Inc., filed a timely Petition for Rehearing which was denied, without opinion, on May 3, 2001. This Petition for Writ of Certiorari is being filed within 90 days of that date. A copy of the Order denying the Petition for Rehearing is printed as Appendix B to this Petition. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the application of the following Constitutional and Statutory Provisions:

Amendment V of the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States provides in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[Pertinent text of the statutory provisions are set forth in Appendix J as provided in Rule 14.1 (f) of the Rules of the Supreme Court.]

Arkansas Code Annotated § 28-63-101, et seq. (Michie Repl. 1994; Supp. 1999), found infra at Appendix J .

STATEMENT OF THE CASE

1. Introduction. As is set forth in detail below, Petitioners contend that Respondent used improper tactics to take over an established insurance company while ignoring procedural and substantive safeguards. Respondent obtained an Order granting an *ex parte* permanent injunction and receivership even before filing his Petition. Petitioners have not been afforded the opportunity to challenge the allegations in the Petition. Unless this Court intervenes, Respondent will be successful in preventing due process scrutiny of his actions.

Petitioners argued below that they were entitled to due process and a full hearing before their property interest was taken from their control. Appendix H. The Circuit Court of Pulaski County, Arkansas, denied their Motion to Set Aside the Permanent Injunction and Order Appointing Receiver. Appendix C. The Arkansas Supreme Court affirmed this ruling by a vote of four to three and specifically noted that Petitioners did "urge in their motion to set aside the permanent injunction that their property was being taken without a chance to be heard. That is enough to raise the issue." Appendix A. Therefore, the federal question was timely and properly raised, giving this Court jurisdiction to review the judgment on a writ of certiorari.

2. The Parties. American Investors Life Insurance Company ("American Investors") was an insurance company domiciled and doing business in the State of Arkansas. Appendix F. Pursuant to statutory authority, the office of the Respondent, Mike Pickens, the Arkansas Insurance Commissioner, reviewed the financial condition of American Investors. Appendix F. American Investors is owned by Holdingsco, Inc. which is owned by Bob E. Fewell ("Fewell"). Appendix F.

3. The Agreements. Following a review of the financial condition of American Investors Life Insurance Company, Respondent and Petitioners entered into certain agreements. The first agreement attached to the Petition was dated May 28, 1999 (the "Agreement") and cured certain alleged capital surplus deficiencies. Appendix F. The second agreement attached to the Petition was captioned "First Amended and Substituted Agreement" and was dated December 30, 1999 (the "Amended Agreement"). Appendix F. Both agreements created specific duties for all the parties and contractual consequences for failure to comply with the agreements.

The Agreement contained a consent to a receivership under certain conditions. It provided in pertinent part:

> 6. However, upon breach of any of the aforesaid covenants, the Company [American Investors], the parent [Holdingsco] and Fewell hereby agree and consent to the immediate commencement and entry of an Order Granting Receivership against the Company by the Department under Ark. Code Ann. § 23-68-101 through § 23-68-132 and waive prior notice of entry of an Order of Permanent Receivership.

Appendix F.

A dispute arose regarding the payment obligations in the Agreement. In order to make certain "clarifications" and correct "misunderstandings," the parties entered into an Amended Agreement on December 30, 1999. Appendix F. In connection with the Amended Agreement, Fewell executed a promissory note to American Investors in the

amount of $1,407,802.63 (the "1.4 Million Note"). Appendix F. The Note was payable on or before June 30, 2000 subject to the following provision:

> PROVIDED, HOWEVER, that the principal and applicable interest due hereunder may be reduced or offset in accordance with the provisions of subparagraph 2(b) of . . . [the Agreement and Amended Agreement], which agreement is incorporated herein by reference and made a part hereof.

Appendix F. As discussed below, subparagraph 2(b) was amended to impose a True Up calculation.

The Amended Agreement contained several amendments to the Agreement, including an additional requirement of a True Up calculation, i.e., an actual calculation, as to both agreements. Appendix F. It amended subparagraph 2(b) as follows:

> (b) the amounts due under the terms of the One Million Four Hundred Seven Thousand Eight Hundred Two Dollars and Sixty Three Cents ($1,4067,802.63) Promissory Note [the "1.4 Million Note"], as provided for in subparagraph2 (a)(3) above and attached hereto as Exhibit "H," may be adjusted as follows:
>
> > (i) by reducing the principal amount due in an amount equal to the difference between the actual amount of claims reserves utilized to pay all just and valid claims incurred by the Company in 1999 and the claim reserve of Seven Million Seven Hundred Thirteen Thousand Nine Hundred Twenty Dollars

> ($7,713,920.00) posted by the Company on December 30, 1999 for 1999 incurred claims. This difference in reserve amount, if any, shall be calculated on or before June 30, 2000 ("1999 Reserve True Up");
>
> * * * *
>
> 4. Paragraph 4 of the Agreement is hereby amended and shall read as follows:
>
> Fewell hereby personally guarantees the Company will meet the One Hundred Fifteen Thousand Dollar ($115,000.00) minimum capital and surplus requirement as of December 31, 1999, and that any shortfall will be contributed by Fewell in order to cure any shortfall resulting from the *1999 Reserve True Up*, referred to in subparagraph 2(b) above (emphasis added).

Appendix F. It is these same provisions relating to the True Up which Respondent contends were violated and triggered the consent to the receivership. Appendix F.

4. The Dispute. According to the record in this case a dispute arose between the parties in June 2000.[1] Appendix F. As a result of these communications, Respondents were aware that Petitioners were represented by counsel and

[1]The only documents in the record evidencing the dispute are the self-serving letters of the Arkansas Insurance Department dated June 30, 2000, and July 5, 2000. Appendix F. While Respondent initially represented that the letters were included only as evidence of "demand"(See Appendix F), Respondent later substantially relied on the letters to justify to extraordinary relief he obtained.

communicated with Petitioners' counsel concerning the matters which are the subject of this appeal. Appendix F. Respondent contended that as a result of the "1999 Reserve True Up" (defined in the Amended Agreement as an "actual" calculation) that certain capital deficiencies existed. Appendix F. Respondent alleged that the failure to cure these deficiencies constituted a breach of the Agreements triggering consent to the entry of an Order of Permanent Receivership without prior notice. Appendix F.

This contention by Respondent was based on a calculation by Martin F. Gibson, Consulting Actuary. Appendix F. The report is an estimate based upon actuarial calculations and is not an actual calculation. Appendix F. In submitting his report Gibson stated:

> I have relied upon the date and accuracy of the data established by EOS Health and Milliman & Robertson (M&R). I did not audit or verify the data or other analysis provided to me. Milliman & Robertson performed a limited reasonableness and consistency review of the data used in their analysis that was the basis for the lag data used in this review. M&R did not find any material defects in the data. Note that if the underlying data provided is inaccurate or incomplete, the results of this review may also be inaccurate or incomplete.
>
> In other respects, my review included the development of actuarial assumptions and the use of actuarial methods as I consider necessary in the circumstances.

Reasonableness of Results

> The results of my analysis are dependent on the consistency of the claims experience during the period studied. I have been informed that a new claims payment system was installed during 1999. Also, I have been informed that normal claims payment cycles were altered during 1999 and 2000 due to cash flow problems at AILIC. These factors alone affect the reliability of actuarial estimates of claims reserves. Together these factors make it very difficult to "smooth" fluctuations in lag patterns and make accurate actuarial estimates of claims reserves (emphasis added).

Appendix F. Accordingly, there was no actual calculation or True Up as agreed and negotiated between the parties. Instead, there was only an actuarial estimate with numerous assumptions, limitations, and qualifications. Without the negotiated True Up calculation, there was no consent to the Receivership.

5. The Off-the-Record, *Ex Parte*, Expedited Proceedings. On July 11, 2000, Respondent filed his Petition for the Appointment of Receiver (the "Petition"). Appendix F. However, even before the filing of any Petition, Respondents managed to obtain an off-the-record, *ex parte*, expedited proceeding. A statement of the proceedings of July 11, 2000, is contained in the record. Appendix E. Petitioners had no prior notice of this proceeding and were not afforded the opportunity to be present. Petitioners have no way of verifying or disputing what actually transpired. No sworn testimony was provided in this proceeding. Steve Uhrynowycz, the Deputy Receiver and counsel for Respondent in the Petition, made an oral presentation of the

matters contained in the Petition and answered questions posed by the trial court. "The Court then asked for an Order which was presented, signed, and filed of record." Appendix E.

The record reflects that the Petition in this case was filed on July 11, 2000, at 9:08 a.m. Appendix F. The Permanent Injunction and Order Appointing Receiver for Rehabilitation was entered one minute later at 9:09 a.m. Although not specifically contained in the statement of proceedings, it is abundantly clear that the off-the-record, *ex parte*, expedited proceeding took place prior to the filing of the Petition. It is equally clear that the eight (8) page Order was prepared by Respondent and signed by the trial court without change. It would have been impossible to conduct the hearing and prepare the Order in the one minute which transpired following the filing of the petition.

6. The Permanent Injunction and Order Appointing Receiver for Rehabilitation. The Permanent Injunction and Order Appointing Receiver for Rehabilitation is broad and far reaching, vesting total and complete control of American Investors in Respondent. Respondent and his agents immediately took control of American Investors and divested Petitioners of any role. The Order also provides in pertinent part:

> 2. It further appears that [American Investors], its officers, directors, shareholders, owners, attorneys, agents, employees and representatives, and those persons in active concert or participation with them, should be permanently enjoined from conducting [American Investors'] business of insurance or any other business of [American Investors] in this

> State, under any charter, permit, license, registration, certificate of authority, power or privilege of [American Investors], and from in any manner wasting, disposing of, transferring, selling, assigning, canceling, concealing or hypothecating any of [American Investors'] books, records, money, accounts, stocks, bonds, assets, notes, equipment, funds, accounts receivable, policies of insurance or other property, real, personal or mixed, wherever situated, which is owned by, in the possession of or claimed by [American Investors].

Based upon the pleadings alone and without any additional evidence, the trial court made (1) a *prima facie* finding of breach of impairment of financial conditions; (2) ruled that American Investors consented to the entry of an order of permanent receivership; and (3) a finding that Respondent made a *prima facie* case of breach of covenants of the Agreements. Appendix C. Significantly, nowhere in the Order prepared by Respondent was the True Up requirement mentioned.

Under Section II of the Permanent Injunction and Order Appointing Receiver for Rehabilitation, Respondent was appointed Receiver of American Investors "for the purpose of rehabilitation . . . ." The Respondent was given broad and far reaching power vesting him with total and complete control of American Investors. Appendix C.

Finally, Section III of the Order contained a permanent injunction enjoining and restraining Petitioners and others from taking virtually any action related to American Investors. Appendix C. Likewise, the same

enjoined persons were directed to surrender and produce all books, records, assets, and property of American Investors to Respondent. Appendix C.

7. Efforts by Petitioners to Intervene And To Set Aside Permanent Injunction. As a direct result of the entry of the Permanent Injunction and Order Appointing Receiver for Rehabilitation, Petitioners were left with no opportunity for appeal or to challenge its entry. They were not a party to the trial court proceedings and could not challenge the actions of Respondent. The only party who could appeal the decision was American Investors which was within the complete control of Respondent. Had Petitioners attempted to appeal on behalf of American Investors, they would have been in direct contravention of the Order and subject to sanctions for contempt.

On July 31, 2000, Petitioners filed a Motion to Intervene and Incorporated Brief. Appendix H. Petitioners alleged:

> 5. As the [Respondent] is now in control of the operations of [American Investors], there is no one to either object to or prosecute an appeal of the Order entered against [American Investors], and ultimately against the interest of [Petitioners].

Appendix H. Petitioners further alleged:

> 8. However, [Petitioners] will only have standing to appeal the Order if the Order is first set aside and [Petitioners] are allowed to intervene; following which movants could state their objections and the Court could

> either re-enter the same Order; dismiss the Petition; or modify said Order as the conditions warrant (see Frazier v. McHaney, 117 Ark. 419, 178 S.W. 419, 420 (1915) "only those who were parties to the suit when the final decree was entered would have the right to prosecute an appeal.")

Appendix H.

Petitioners attached to the Motion to Intervene a Motion to Set Aside Permanent Injunction and To Dismiss as well as a supporting Brief. Appendix H. Petitioners argued that Respondent should not be allowed to enforce an agreement which he materially breached. Appendix H. Petitioners also identified other material issues including misrepresentations made by the Respondent:

> [Petitioners] specifically reserve claims of misrepresentation to this Court by the Petitioner in connection with the Permanent Injunction and Order Appointing Receiver for Rehabilitation. The Petition and Order contain the specific representations that they are for the purpose of rehabilitation - not liquidation. [Petitioners] believe, and therefore allege, that the [Respondent] never intended a rehabilitation and always intended a liquidation. Further, although [Respondent] has only been granted authority for a rehabilitation, Petitioner is in the process of a liquidation and has no known plans for a rehabilitation. This is a material misrepresentation to the Court and exceeds the authority granted by this Court.

Appendix F.

Respondent opposed both the Motion to Intervene (Appendix G) and the Motion to Set Aside Permanent Injunction and To Dismiss. Appendix H. In support of his Response to Petitioners' Motion to Intervene, Respondent contended that Petitioners were not necessary parties to the action and argued that they consented to the Receivership. Appendix G. Respondent opposed the Motion to Set Aside Permanent Injunction on a similar basis. Appendix H.

On August 4, 2000, a "hearing" was conducted before the trial court in connection with Petitioners' Motions. Appendix E.[2] Petitioners were allowed to intervene. Appendix E. Petitioners also requested that the Petition be dismissed and that the Permanent Injunction and Order Appointing Receiver for Rehabilitation be vacated or set aside. Petitioners argued that there was no basis for the entry of a Permanent Injunction because the calculation in the actuarial report was an estimate. After considering the arguments of counsel the Court denied the Motion to Set Aside the Injunction and to Dismiss. No testimony was presented by either side. Appendix D.

Petitioners filed an appeal to the Arkansas Supreme Court alleging, *inter alia*, a denial of their constitutional rights to due process of law. The Arkansas Supreme Court held, in a 4 to 3 decision, that, despite the mandatory language

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[2]Again, this hearing was not conducted on the record since the court reporter was unavailable. A dispute exists between the parties as to what transpired in the hearing. Each party submitted their own statement of proceedings. In an Order dated October 6, 2000, the trial court approved the statements of the Respondent. Appendix E.

of the relevant statutory law, and despite the *ex parte* proceedings below, Petitioners waived their rights by signing the Agreements on which Respondent based his original petition. Petitioners now bring this Petition for Writ of Certiorari asking this Court to review the limited procedures afforded them below.

REASONS FOR GRANTING REVIEW

I. The Court Should Grant Review Because Petitioners Were Denied the Most Basic and Minimal Constitutional Protections.

Petitioners seek to protect their property rights through ordinary judicial proceedings designed to assure due process of law. They have been unfairly denied these rights by the swift and unfettered actions of Respondent through its obtaining an *ex parte* permanent injunction and receivership taking over their long-standing insurance business.

The Fifth Amendment to the United States Constitution mandates that no person may be deprived of life, liberty, or property without due process of law. Amendment 14, Section 1 of the Constitution of the United States reads in part as follows:

> Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642, 2649 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 111-112, 95 S.Ct. 854, 861-62 (1975). Procedural due process imposes constraints on governmental decisions which deprive

individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Matthews v. Eldridge*, 424 U.S. 319, 332-335, 96 S.Ct. 893, 901-03 (1976). "There can be no doubt that, at a minimum, the [constitutional safeguards] require that the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Goss v. Lopez*, 419 U.S. 565, 579-80, 95 S.Ct. 729, 739 (1975). Petitioners were denied this most basic right.

This Court has long stated that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965). *See Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914). It is equally well-grounded that a litigant is entitled to his day in court and to a hearing before judgment is rendered foreclosing his rights. *Old Wayne Mutual Life Ass'n. v. McDonough*, 204 U.S. 8, 14, 27 S.Ct. 236, 238 (1907)).

This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-76 (1974). *See, e. g. Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-97, 51 S.Ct. 608, 611-12 (1931). *See also Dent v. West Virginia*, 129 U.S. 114, 124-25, 9 S.Ct. 231, 234 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti- Fascist Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646 (1951) (Frankfurter, J., concurring). In this respect, in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), this Court held:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possession. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Id. at 81, 92 S.Ct. at 1994.

As previously noted, American Investors Life Insurance Company ("American Investors") was an insurance company domiciled and doing business in the State of Arkansas. American Investors is owned by Holdingsco, Inc. which is owned by Bob E. Fewell ("Fewell"). Pursuant to statutory authority, the office of the Respondent, Mike Pickens, the Arkansas Insurance Commissioner, reviewed the financial condition of American Investors.

Following a review of the financial condition of American Investors Life Insurance Company, Respondent and Petitioners entered into certain agreements. The agreements were intended to cured certain alleged capital

surplus deficiencies. Both agreements created specific duties for all the parties and contractual consequences for failure to comply with the agreements.

In June of 2000, the parties began to dispute their contractual duties. On July 11, 2001, Respondent sought, and obtained an *ex parte* Permanent Injunction and Order Appointing Receiver to takeover the affairs of American Investors Life Insurance Company. Subsequent to the entry of the Order, Petitioners were allowed to intervene. However, because the trial court refused to set aside the Order so that a hearing on the merits could take place, Petitioners were again placed in a position of suffering a harm for which they had no remedy. To date, Petitioners have been denied any opportunity to be heard at a meaningful time and a meaningful place prior to the deprivation of their significant interest in American Investors. These actions were a violation of the due process clause of the United States Constitution.

The Arkansas Supreme Court bypassed the issue by holding that Petitioners waived their rights under the applicable statutes, discussed *infra*, by signing the Agreements between the parties. However, this reasoning does not address the issue of the Petitioners' rights to have a judicial determination of breach of the agreements before any of the waiver provisions of the Agreements could be enforced. Petitioners sought a fair adversarial proceeding at which to contest the allegation of breach of the Agreements made by the Respondent. Petitioners were denied this most simple and fundamental step, and were thereby, denied their constitutional rights.

This Court should grant review so as to consider and restore the property rights of the Petitioners and to enforce the

basic precepts of the Due Process Clause of the United States Constitution.

II. The Court Should Grant Review Because the State Ignored Statutory Procedures Designed to Protect the Property Rights of the Petitioners and Obtained *Ex Parte* Relief, Thereby Unconstitutionally Depriving Petitioners of Their Protected Property Interests.

By this petition, Petitioners do not allege the unconstitutionality of the Arkansas statutes bearing directly on the proceedings at issue. To the contrary, by enacting the Arkansas Uniform Insurers Liquidation Act, Ark. Code Ann. § 23-68-101 through 132 (Michie Repl. 1994; Supp. 1999) (hereinafter "Uniform Act"), the Arkansas General Assembly intended to acknowledge and protect the significant rights of the parties involved in insurer liquidation and rehabilitation proceedings. However, the Arkansas Supreme Court's decision affirming the Receiver's actions, despite his non-compliance and deliberate avoidance of the Uniform Act, leaves the constitutional rights of the Petitioners ignored and unprotected. Quite simply, Arkansas law seeks to protect Petitioners' rights; to set the "rules" for insurer liquidation and rehabilitation. Respondent avoided the rules and was allowed to make up his own rules as he went along. This unfair procedure deprived Petitioners of their rights to fundamental fairness and due process of law.

This Court has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In *Fuentes v. Shevin*, 407 U.S. 67, 96-97, 92 S.Ct. 1983, 2002-03 (1972), the Court held that

in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, the Court in *Bell v. Burson*, 402 U.S. 535, 540, 91 S.Ct. 1586, 1590 (1971) held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." *See also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607, 95 S.Ct. 719, 722-23 (1975). Finally, in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct.1633 (1974), the Court sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. Id. at 142-146, 94 S.Ct. at 1638-1640.

According to the Court in *Matthews v. Eldridge*, *supra* at 319, 96 S.Ct. at 902, these decisions underscore the truism that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Id. (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). To determine what process is constitutionally due, the Supreme Court has set forth a balancing test of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if

> any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Gilbert v. Homar, 520 U.S. 924, 931-32, 117 S.Ct. 1807, 1812 (1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)). *See also, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 1157 (1982).

A. Respondent avoided statutory protections specifically designed to protect the constitutional rights of the Petitioners.

Under the mandatory terms of the Uniform Act, without the consent of Petitioners (which was not triggered), a permanent injunction could not and would not have been entered in the manner it was entered in this case. Strict compliance with procedural steps should have first been required before leave to institute the receivership would have been granted, the most important of which was a "full hearing." Because the Respondent ignored the dictates of statutory law, Petitioners were denied their constitutional rights.

Pursuant to Ark. Code Ann. § 23-68-104, Respondent must begin any delinquency proceedings against an insurer by applying to the court for an order directing the insurer to show cause why the Respondent should not have his requested relief. Upon the return of such an order to show cause, and "after a full hearing", the court either denies or grants the application. Id. (emphasis added). Petitioners should have been afforded not only an opportunity to respond, but also a "full hearing" as required by law. Id.

Because of the substantial public interests at issue, Respondent has access to summary rehabilitation and liquidation procedures in order to quickly protect the public from unlawful or undesirable acts of insurers licensed to do business in the State. However, this power is balanced against the interest of the insurer in being afforded an opportunity to respond to the Commissioner's charges. The protections created by the Arkansas State Legislature and codified at Ark. Code Ann. § 23-68-101, *et seq.* serve this purpose by statutorily furthering the insurer's rights through the tool of a "full hearing." See Ark. Code Ann. § 23-68-104.

The concept of a "full hearing" implies a proceeding in which the parties will be permitted to introduce evidence which will be received and weighed by the trier of fact. *Southwestern Bell Tel. Co. v. Ark. Public Service Com'n.*, 58 Ark. App. 145, 946 S.W.2d 730, 736 (1997) ("The opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing ...."). Quite simply, the validity and propriety of Respondent's allegations should have been tested.

Where the disputed question of consent to a receivership is in issue, the trier of fact should determine whether consent actually was given after a "full hearing" as required by Arkansas law. *See* Ark. Code Ann. § 23-68-104. This determination cannot be adequately made merely upon the "*prima facie*" evidence offered by only one of the parties in an off-the-record, *ex parte*, expedited proceeding. Respondent's burden of proof necessary to obtain his extraordinary injunctive relief and the appointment of a receiver is a far cry from an *ex parte prima facie* showing. Not only were Petitioners not afforded the opportunity to present their own evidence on the issue of consent, they were not even allowed to cross-examine Respondent's witnesses

and documents with respect to this question. Indeed, there was no live testimony in this case.

By avoiding the statutory procedures mandated by the Arkansas General Assembly, Respondent has likewise avoided the protection required for the Petitioners' constitutional rights to due process of law before the ultimate taking of their property. Respondent avoided the rules and made them up as he went along. The applicable rules and procedures were deliberately stated by the Arkansas Legislature to avoid a taking such as this. Without rules, anarchy reigns and due process is suffocated.

B. Due Process requires compliance with minimal statutory safeguards to protect Petitioner's property interests.

The fact that Respondent claims that he was actually entitled to the injunctive relief and the receivership does not excuse the blatant violation of statutory and constitutional rights. Indeed, as this Court stated in *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 35 S.Ct. 625, 629 (1915):

> To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

Similarly, the Supreme Court has faced a situation in a "taxpayer case" where the taxpayers alleged denial of a meaningful opportunity to contest the actions of the state. The Court noted:

> we have previously struck down as a violation of due process a state court's decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds. *See Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451 (1930). . . . "We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final.... Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support.... [W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Id., at 681-682, 50 S.Ct., at 454-455.(Emphasis added).

Richards v. Jefferson County, Alabama, 517 U.S. 793, 803-04, 116 S.Ct. 1761, 1768-69(1996).

The Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law. " U.S. Const., Amdt. 14, § 1 . The United

States Supreme Court has accordingly held that "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest ... is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990) (emphasis deleted). Where a State deprives a property owner of a constitutionally protected interest and provides no remedy, or only inadequate remedies, a deprivation of property without due process may result. *See Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 642-43, 119 S.Ct. 2199, 2208 (1999) (citing *Parratt v. Taylor*, 451 U.S. 527, 539-541, 101 S.Ct. 1908, 1916 (1981); *Hudson v. Palmer*, 468 U.S. 517, 532-533, 104 S.Ct. 3194, 3202 (1984); Id., at 539, 104 S.Ct. 3194 (O'CONNOR, J., concurring) ("[I]n challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate.... When adequate remedies are provided and followed, no ... deprivation of property without due process can result").

In this case, Petitioners were denied access to the very remedies and procedures for which state law provides. Respondent, in his capacity as an executive officer of the State of Arkansas, took over American Investors Life Insurance Company without regard to procedures and remedies mandated by the law. Petitioners were only allowed to appear before the trial court on the issue after the entry of the Permanent Injunction and Order Appointing Receiver, and were not allowed to present any evidence whatsoever. In fact, no court reporter was even present at the hearing and no official record what made contemporaneously with the hearing. This hearing, granted after the fact of the installation of the receivership, was truly no hearing at all.

The arbitrary procedure adopted by the trial court prevented any opportunity to address the issue of consent. The intent of the Arkansas State Legislature in setting out the statutory protections in Ark. Code Ann. § 23-68-101, *et seq.* was violated. The Order should be set aside.

CONCLUSION

This Court should grant review by writ of certiorari in order to consider and determine the adequacy and appropriateness of the actions of Respondent, the Insurance Commissioner for the State of Arkansas, and the decisions of the Arkansas Supreme Court and the Pulaski County, Arkansas, Circuit Court.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Supreme Court of Arkansas

Nos. 00-1279, 00-1272.

Bob E. FEWELL and Holdingsco, Inc.
v.
Mike PICKENS, Receiver of American Investors Life Insurance Company.

Opinion delivered April 5, 2001.
344 Ark. 368, 39 S.W.3d 447(2001)

Appeal from the Pulaski County, Arkansas, Circuit Court, No. 2000-533, Hon. John Plegge, Affirmed.

ROBERT L. BROWN, Associate Justice.

The appellants in this case, Bob E. Fewell and Holdingsco, Inc., appeal from an order by the Pulaski County Circuit Court appointing a receiver for American Investors Life Insurance Company (American Investors) and enjoining the appellants from transacting business for the company. They further appeal from an order denying their motion to vacate the appointment of the receiver and the injunction and from an order denying their motion to strike an affidavit of service. The appellee in this case is Mike Pickens, who is the Arkansas Insurance Commissioner and who was appointed receiver for American Investors. Fewell and Holdingsco raise multiple points in this appeal in which they contend that the circuit court erred in its various orders. We hold that the issues raised are without merit, and we affirm.

American Investors is a life insurance company domiciled in Arkansas. Its parent company is Holdingsco, although Fewell owns a fractional interest in the company. Fewell is the owner of Holdingsco. In 1999, following a review of American Investors's financial solvency, Pickens found a $2,935,000 capital surplus deficiency in the company. [FN1] As a result, on May 28, 1999, the Arkansas Insurance Department, American Investors, Holdingsco, and Fewell entered into an Agreement to cure the deficiency. The purpose of the Agreement was to enable American Investors to be considered solvent as of December 31, 1998. The Agreement provided that in consideration of the Insurance Department's forbearance in putting American Investors into receivership, American Investors, Holdingsco, and Fewell would make up the $2,935,000 capital surplus deficiency with deposits and promissory notes. The Agreement also contained a personal guaranty by Fewell that American Investors would meet the minimum capital surplus requirement of $115,000 as of December 31, 1999. The Agreement further provided that upon the breach of any of its covenants, American Investors, Holdingsco, and Fewell consented to the immediate commencement of receivership proceedings, the entry of an order granting receivership, and waiver of prior notice to the entry of such an order.

FN1. This figure was determined as a result of operations ending December 31, 1998.

On December 30, 1999, the same parties entered into a First Amended and Substituted Agreement. Under the First Amended Agreement, Fewell executed a promissory note dated the same day in the amount of $1,407,802.63, which was payable in full to American Investors on or before June 30, 2000. Additionally, Fewell reaffirmed his personal guaranty that American Investors would meet the minimum

capital surplus requirement of $115,000 as of December 31, 1999. The First Amended Agreement included a provision that unless modified therein, all other portions of the prior, original agreement remained in effect and "[were] hereby ratified, and incorporated herein by reference."

The First Amended Agreement also contained a provision that Fewell's ultimate liability under the $1,407,802.63 promissory note and his personal liability for American Investors's operations ending December 30, 1999, might be adjusted downward following the calculation of the "1999 Reserve True Up," which would determine the amount needed to pay incurred claims for 1999. Reserves on hand for 1999 claims totaled $7,713,920. A "Review of Claims Reserves for American Investors Life Insurance Company" was issued on June 28, 2000 by a consulting actuary, Martin F. Gibson. The Gibson Review calculated the total claims reserve for American Investors as of December 31, 1999, at $12,183,000, which exceeded the $7,713,920 figure by over $4 million. Correspondence between the parties followed, and Fewell failed to pay the amount owed under his promissory note by June 30, 2000. As a result, on July 11, 2000, Pickens, as Insurance Commissioner, commenced receivership proceedings against American Investors pursuant to the Uniform Insurers Liquidation Act, Ark.Code Ann. § 23-68-101 through 132 (Repl.1994, Supp.1999) (Uniform Act), by filing a petition for the appointment of receiver and injunctive relief.

On that same day, a hearing was held before the Pulaski County Circuit Court. At its conclusion, the court entered an order entitled Permanent Injunction and Order Appointing Receiver for Rehabilitation. On July 31, 2000, Fewell and Holdingsco moved to intervene in the action. On August 4, 2000, a hearing was held before the circuit court

and appellants' intervention motion was granted. The appellants also moved at this hearing that the order of receivership and the injunction be set aside and dismissed. The circuit court denied appellants' petition. This appeal followed.

I. Motion to Dismiss

As a preliminary matter, we consider Pickens's motion to dismiss, which is based on his allegation that the record in this appeal was untimely filed. On November 3, 2000, Pickens filed his motion to dismiss which was submitted with this case for resolution. In it, he urges that the Permanent Injunction and Order Appointing Receiver for Rehabilitation issued by the circuit court on July 11, 2000, "was an interlocutory order within the meaning of Rules 2(a)(6), 2(a)(7), and 5(a) of the Arkansas Rules of Appellate Procedure-Civil ." Thus, he maintains that Fewell and Holdingsco were required to lodge the record on appeal within thirty days of the order's entry pursuant to Ark. R.App. P.--Civ. 5(a). This, he contends, the appellants failed to do. Furthermore, Pickens asserts that the order establishing the "permanent" injunction and receivership clearly contemplated additional actions by the circuit court and, thus, was interlocutory.

We disagree with Pickens's characterization of the July 11, 2000 order in this case. The Uniform Act has this to say about the finality of orders:

> An appeal shall lie to the Supreme Court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every other order in delinquency proceedings having the character of a

final order as to the particular portion of the proceedings embraced therein.

Ark.Code Ann. § 23-68-103(d) (Supp.1999). There are two aspects of § 23- 68-03(d), which we believe are important. First, the section contemplates more than one final order in delinquency proceedings. Second, the order in question in this case is entitled *Permanent* Injunction and Order Appointing Receiver for Rehabilitation. We have no doubt that over the course of the delinquency proceedings, other orders might be entered by the circuit court which touch and concern this order. But on its face, the character of the order appointing the receiver and providing *permanent* relief is clearly that of finality. The motion to dismiss is denied.

II. Standing

Pickens further raises the question of the appellants' standing to appeal. [FN2] He advances the argument that they are non- parties to the order of receivership and injunction and, thus, should be precluded from taking this appeal unless pecuniarily affected. *See In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990). Far from being pecuniarily affected, Pickens contends that any claim for relief by the appellants merely derives from the rights of American Investors.

FN2. The standing issue was also raised in Pickens's Reply to the Appellants' Response to the Motion to Dismiss Appeal. The appellants moved to strike the Reply because it raised a new issue to which the appellants had no opportunity to respond. We need not decide the appropriateness of the Motion to Strike because the standing issue was raised in Pickens's brief on appeal, and the appellants responded to it in their Reply Brief.

We disagree with Pickens on this question. Holdingsco is the parent company of American Investors, and Fewell is the owner of Holdingsco. The pecuniary interest of the appellants is real and considerable. We conclude that the appellants have a pecuniary interest affected by the circuit judge's action and, thus, have standing to bring this appeal. *See In the Matter of $3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999); *In the Matter of Allen, supra.*

III. Validity of Permanent Injunction and Receivership Order

Fewell and Holdingsco mount four arguments contesting the validity of the Permanent Injunction and Order Appointing Receivership for Rehabilitation: (1) the order was invalid without a 1999 True Up Calculation; (2) the order was entered *ex parte* and violated their rights to due process; (3) Pickens did not follow the mandatory procedures of the Uniform Act; and (4) the circuit court erred in denying their motion to set aside the permanent injunction and receivership order.

a. Absence of True Up Calculation

The appellants' initial argument is that there was no 1999 True Up Calculation done, as required by the First Amended Agreement. Hence, they claim that Fewell's obligation to pay the $1,407,802.63 promissory note by June 30, 2000, was never triggered because the extent of incurred claims for 1999 was never actually calculated. Their argument continues that because the promissory note was not due and payable as of June 30, 2000, due to the lack of a True Up calculation, there was no breach of the Agreement and no consent to an *immediate* receivership.

We consider two provisions of the 1999 agreements entered into between the Arkansas Insurance Department, American Investors, Fewell, and Holdingsco to be critical. The first is the consent provision in the May 28, 1999 Agreement:

> However, upon breach of any one of the aforesaid covenants, the Company, the Parent and Fewell hereby agree and consent to the immediate commencement and entry of an order granting receivership against the Company by the Department under Ark.Code Ann. § 23-68-101 through § 23-68-132 and waive prior notice of entry of an order of permanent receivership.

The second provision is in the First Amended Agreement entered into on December 30, 1999:

> (b) The amounts due under the terms of the One Million Four Hundred Seven Thousand Eight Hundred Two Dollars and Sixty Three Cents ($1,407,802.63) Promissory Note, as provided for in subparagraph 2(a)(3) above, and attached hereto as Exhibit "H," *may* be adjusted as follows:
>
> (i) by reducing the principal amount due in an amount equal to the difference between the actual amount of claims reserves utilized to pay all just and valid claims incurred by the Company in 1999 and the claim reserve of Seven Million Seven Hundred Thirteen Thousand Nine Hundred Twenty Dollars ($7,713,920.00) posted by the Company on December 30, 1999 for 1999 incurred claims. This difference in reserve amount, if any, shall be calculated on or before June 30, 2000 ("1999 Reserve True Up")[.]

Pickens first argues that American Investors was

impaired in early 1999 and that the initial Agreement dated May 28, 1999, was an effort by the affected parties to cure the capital surplus deficiency with promised deposits and promissory notes. Failing that, American Investors consented to an immediate receivership and waived all notice. Apparently, there was some misunderstanding about the Agreement, and the First Amended Agreement represented additional forbearance by the Insurance Department if additional capital was provided to meet incurred claims for 1999. Part of that additional capital was in the form of Fewell's promissory note in the amount of $1,407,802.63, due and payable to American Investors on June 30, 2000. The only potential for reducing that obligation was if the 1999 claims did not exceed the claim reserve of $7,713,920.

It is clear to this court that the 1999 incurred claims did exceed $7,713,920 based on an actuarial report prepared by consulting actuary Martin F. Gibson, which showed the needed claims reserves to be $12,183,000. This report was dated June 28, 2000, and was furnished to American Investors. In addition, the circuit court considered the True Up issue at the hearing on August 4, 2000. There was no recording or transcription of the hearing on that date, but Statements of Proceedings were prepared by both counsel for Fewell and Holdingsco and counsel for Pickens. First, there is the Statement by counsel for Fewell and Holdingsco:

> 3. Intervenors also argued that there was no basis for the entry of a permanent injunction since the Arkansas Insurance Department failed to conduct a "True Up" i.e., the actual calculation, which was the basis for the alleged consent to the receivership.
>
> 4. Steve Uhrynowycz, counsel for the Petitioner,

represented to the Court that a definite True Up number was provided to American Investors Life Insurance Company on June 23, 2000, and that there was no breach of the agreement.

4. [*sic*] Counsel for the Petitioner contended that there was no basis to set aside the permanent injunction and opposed the relief requested by Intervenors.

5. After considering the arguments of counsel the Court denied the Motion to Dismiss and to Set Aside the Injunction.

Next, there is the Statement by Pickens's counsel of what transpired:

3. Intervenor also argued that there was no basis for the entry of a permanent injunction because the figure in the actuarial report attached to the Petition for Appointment of Receiver was an estimate.

4. Steve Uhrynowycz, one of the counsel for Petitioner argued in response that a true-up number was provided to American Investors Life Insurance Company and that the true-up number was contained in the pleadings. Uhrynowycz further argued Intervenors argument failed to address the outstanding $1.4 million promissory note owed to American Investors Life Insurance Company.

5. After considering the arguments of counsel, the Court denied the Motion to Dismiss and to Set Aside the Injunction. [FN3]

FN3. The circuit court adopted this Statement of the proceedings.

Based on these Statements, which reconstruct the events at the August 4, 2000 hearing, the appellants made their True Up argument to the circuit court in support of their motion to dismiss the receiver and set aside the permanent injunction, and their motion was denied. We agree with Pickens that the circuit judge considered the True Up argument of the appellants and rejected it.

Furthermore, a letter from the Insurance Department dated June 30, 2000, to counsel for appellants made it clear that Fewell's promissory note was due. This letter was Exhibit A to Pickens's petition for receivership and stated in part:

While I recognize you have only recently been retained to represent Mr. Fewell, Mr. Fewell and his previous counsel have been well aware of this obligation for six (6) months. As soon as the company paid out greater than $7.7 Million in 1999 incurred claims, management and, we trust ownership, knew the entire $1.4 Million obligation was payable in full. As evidenced by the Milliman & Robertson/ Rex Durrington report dated June 15, 2000, which was communicated to the Company on June 16, 2000 and handed to the Company's President, Randy Coleman, on June 19, 2000, the Company had previously paid out $9.9 Million in 1999 incurred claims.

The True Up calculation was a benefit to Fewell and a means to reduce his liability under his promissory note should the 1999 claims not exceed the $7.7 million claims reserve. It is obvious that the claims had exceeded this amount by June 30, 2000, and that the appellants were aware of this. Nevertheless, Fewell and Hollingsco, who at that time still controlled American Investors, took no steps to refute the calculations made by the consulting actuary or contained in

the Milliman & Robertson/Rex Durrington report. We hold that the circuit judge correctly found that a breach of the 1999 Agreements occurred.

b. Ex parte *Order and Mandatory Statutory Procedures*

The appellants next contend that the circuit judge deprived them of their due process rights by entering the receivership order and injunction *ex parte*. We disagree. As an initial matter, Pickens argues that a due process claim was never made by the appellants. The appellants did, however, urge in their motion to set aside the permanent injunction that their property was being taken without a chance to be heard. That is enough to raise the issue in our judgment.

The Uniform Act discusses delinquency proceedings generally and provides that the Pulaski County Circuit Court shall have original jurisdiction over delinquency proceedings pursuant to the chapter. *See* Ark.Code Ann. § 23-68-103(a) (Supp.1999). Moreover, the Uniform Act provides that " [d]elinquency proceedings pursuant to this chapter shall constitute the *sole and exclusive* method of liquidating, rehabilitating, reorganizing, or conserving an insurer[.]" Ark.Code Ann. § 23-68- 103(c) (Supp.1999) (emphasis added). Accordingly, in order for the Insurance Commissioner to achieve his appointment as receiver of American Investors, and the granting of an injunction against the company, he was required to follow the procedures outlined in the Uniform Act. We initially conclude that the Uniform Act establishes a special statutory proceeding for receivership matters and associated injunctions and, as a consequence, the proceedings involved in this matter which are fixed by statute are not controlled by the Arkansas Rules of Civil Procedure. *See* Ark. R. Civ. P. 81(a).

Fewell and Holdingsco rely heavily on allegations that Pickens did not comply with the strict terms of § 23-68-104 of the Uniform Act, which provides:

> The commissioner shall commence any such [receivership] proceedings by application to the court for an order directing the insurer to show cause why the commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers, or the public may require.

Ark.Code Ann. § 23-68-104 (Repl.1994). The statute clearly contemplates, according to the appellants, that in order for Pickens to begin the delinquency proceedings, he must apply to the Pulaski County Circuit Court for an order directing American Investors to show cause. This was not done, they claim. Nor was a "full hearing" held, as required by § 23-68-104.

Pickens's retort is that Fewell and Holdingsco consented to the immediate entry of a receivership order in the event of a breach of the May 28, 1999 Agreement. Again, that Agreement contained this language:

> However, upon breach of any one of the aforesaid covenants, the Company, the Parent and Fewell hereby agree and consent to the immediate commencement and entry of an order granting receivership against the Company by the Department under Ark.Code Ann. § 23-68-101 through § 23-68-132 and waive prior notice of entry of an order of permanent receivership.

Because Fewell breached the Agreement by not paying the promissory note by June 30, 2000, Pickens maintains that he was perfectly within his rights to ask for an immediate receivership and that the circuit judge had full authority to grant one *ex parte*. Pickens emphasizes that he had worked with the appellants to resolve American Investors capital surplus deficiencies for more than a year, that the deficiencies had not been resolved, and that the increased risk to the policyholders was great.

In light of the language contained in the 1999 Agreements between the parties, we conclude that the statutory requirements of § 23-68-104 do not control in this case. It is true that § 23-68-104 contemplates the commissioner's petition for an order to show cause and a full hearing before granting that petition. But Fewell and Holdingsco waived those statutory requirements under the Uniform Act by consenting to an *immediate* receivership in the event of breach without prior notice. The standard definition of waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he will forever be deprived of its benefits. *Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999) (citing *Continental Ins. Companies v. Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978)); *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993). Fewell and Holdingsco clearly agreed in 1999 to waiver of their statutory rights under § 23-68-104, if Pickens would forbear placing them into receivership at that time.

The circuit court found that the appellants had consented to the entry of an order of receivership without prior notice. We agree with the court's finding and hold that Fewell and Holdingsco waived their rights under § 23- 68-104 by executing the 1999 Agreements. We hold, in

addition, that the immediate entry of a receivership order on July 11, 2000, with the permanent injunction, albeit entered *ex parte*, did not violate due process protections. We further note that on August 4, 2000, the appellants did have the opportunity to be heard on the circuit judge's order. Indeed, at that time they made their argument to the judge concerning the alleged lack of a 1999 True Up Calculation and moved that the July 11, 2000 order be set aside. This request was denied. The August 4, 2000 hearing, in our view, provided the appellants with an opportunity to be heard on the legitimacy of the receivership order.

c. Permanent Injunction

The same holds true for the permanent injunction issued as part of the July 11, 2000 order. The Uniform Act provides:

(1) Upon application by the commissioner for such an order to show cause, or at any time thereafter, the court may *without notice* issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

Ark.Code Ann. § 23-68-105(1) (Repl.1994) (emphasis added). Because the appellants waived the statutory requirement under § 23-68-104 for a show-cause order, the circuit judge could at any time issue the injunction restricting the transaction of business *without notice.*

Fewell and Holdingsco urge that the injunction was invalid because there was no showing of irreparable harm and no showing of the likelihood of success on the merits as required under our common law and Ark. R. Civ. P.

65. The short answer to this point, as already stated in this opinion, is that the Uniform Act is a special statutory proceeding and applies rather than the Rules of Civil Procedure. *See* Ark. R. Civ. P. 81(a). Hence, § 23-68-105(1) applies and controls the grounds for issuing an injunction in delinquency proceedings.

IV. Subject-Matter Jurisdiction

The appellants further claim that the circuit judge lacked subject- matter jurisdiction to issue an injunction in this matter. They claim that injunctive relief rests solely with courts of equity. Pickens responds that § 23-68-103 of the Uniform Act invests original jurisdiction over these delinquency proceedings in the Circuit Court of Pulaski County. He directs our attention to § 23-68-105, which specifically endows the circuit court with the authority to issue injunctions to halt the transaction of business by impaired insurance companies. The appellants reply that § 23-68-105 is unconstitutional under the Arkansas Constitution because it is at odds with the fact that equitable remedies have historically fallen within the bailiwick of chancery courts. Pickens counters that the appellants did not raise the constitutional argument before the circuit judge.

We agree with Pickens that the issue of the constitutionality of § 23-68-105 is raised for the first time on appeal. Accordingly, we will not consider it. *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000); *SEECO, Inc. v. Hales*, 341 Ark. 972, 22 S.W.3d 157 (2000).

With respect to subject-matter jurisdiction, we have already remarked in this opinion that the Uniform Act establishes a special statutory proceeding, which includes the injunctive relief under § 23-68-105. Our caselaw makes this

abundantly clear. *See Bullion v. Pope*, 192 Ark. 959, 96 S.W.2d 465 (1936); *Franklin v. Mann*, 185 Ark. 993, 50 S.W.2d 606 (1932). The General Assembly has endorsed this statutory scheme and invested the circuit courts with the power to issue injunctions under these limited circumstances. We hold that the Pulaski County Circuit Court has subject-matter jurisdiction to issue injunctions in delinquency proceedings under the Uniform Act.

V. Motion to Strike Affidavit of Service

On August 8, 2000, the appellants moved to strike an affidavit of service filed on August 3, 2000, by Steve Uhrynowycz, counsel for Pickens. The affidavit stated that Uhrynowycz had hand-delivered a copy of the Petition for the Appointment of Receiver and the Permanent Injunction and Order Appointing Receiver for Rehabilitation to officers of American Investors on July 11, 2000. The motion to strike asserted that the affidavit did not indicate that American Investors was served with a summons or that Uhrynowycz was authorized to effect service of process as required by Ark. R. Civ. P. 4. The circuit judge denied the motion to strike for the reasons stated in Pickens's response.

We agree with the circuit judge and Pickens that the motion to strike has no merit. The appellants consented to the immediate entry of a receivership order and waived notice of that order in the 1999 Agreements. As a result, there was no requirement that any service be perfected on American Investors or even that notice be given. After Pickens presented his petition on July 11, 2000, the circuit judge made a finding to that effect in his order:

3. In support thereof, the Court finds that Petitioner has made a *prima facie* case that Respondent's financial condition is impaired such that its continued operation outside the

supervision of Petitioner will be hazardous to the general public, and to Respondent's insureds and creditors. The Court further finds that Respondent has consented to the entry of an order of permanent receivership without prior notice upon breach of covenants contained in May 28, 1999 Agreement and December 30, 1999 First Amended and Substituted Agreement, and that Petitioner has made a *prima facie* case of such breach of covenants.
We cannot say this finding is clearly erroneous.

Affirmed.

Arnold, Chief Justice, Corbin and Thornton, Associate Justices, Dissent.

Donald L. Corbin, Associate Justice, dissenting.

I dissent from the majority's conclusion that Appellants waived their rights to notice and a full hearing based on an alleged breach of their agreement with Appellee Insurance Commissioner. I am troubled by the majority's conclusion that the Commissioner was not required to comply with the mandatory requirements of Ark.Code Ann. § 23-68-104 (Repl.1994), despite the fact that the Uniform Act provides the "*sole and exclusive method* of liquidating, rehabilitating, reorganizing, or conserving an insurer[.]" *See* Ark.Code Ann. § 23-68-103(c) (Supp.1999) (emphasis added). The Act plainly contemplates that a full hearing will be held before the trial court may grant the relief sought by the Commissioner in the delinquency proceedings. The reason for a full hearing is unmistakably to enable the trial court to make a learned ruling based on all the facts.

Receivership of an insurance company has far-reaching effects, beyond those felt by the company's owners

and directors. It has very real effects on the policyholders and any other persons who may have claims against the insurance company. Their interests must be protected. Section 23-68-104 advises the trial court to consider the interests of "the policyholders, creditors, stockholders, members, subscribers," as well as the interests of the public, in granting or denying the appointment of a receiver. How the trial court can consider those interests without the benefit of a full hearing prior to the appointment of a receiver is beyond me. Given the other interests at stake, I do not believe that the Commissioner may skirt the notice requirements contained in the Uniform Act based solely on what he claims is a waiver of notice by the owners of the insurance company.

More significantly, I do not read the agreements between the Commissioner and Appellants as giving the Commissioner unilateral authority to determine when a breach of the agreements has occurred. That should have been an issue for the trial court to determine, after hearing evidence from both sides. The trial court's determination that there was a prima facie breach of the agreement is of little or no value, as it was made *ex parte*. Moreover, I disagree with the majority that the "hearing" held on August 4, 2000, after the trial court had already made its *ex parte* ruling, was sufficient for purposes of due process. Appellants undoubtedly had a higher mountain to climb in attempting to convince the trial court that it had erred in making the initial determination that a breach had occurred. Furthermore, the "hearing" granted after the fact was, in reality, no hearing at all; no court reporter was present, and no evidence was heard.

Additionally, I disagree with the majority that the waiver contained in the agreements sufficed to allow the trial court to issue a permanent injunction and restraining order without notice to Appellants. Arkansas Code Annotated §

23-68-105 (Repl.1994) only allows the trial court to issue an injunction or restraining order without prior notice to the insurer if the Commissioner has first sought a show-cause order. That was not done here.

It is evident from the steps statutorily required that the act of placing a corporation into receivership is serious business. The Commissioner is required to commence a receivership by applying to the trial court for an order directing the insurer to show cause why the receivership should not be granted. A "full hearing" must then be held, during which the trial court is to consider the interests of all potential affected parties, as well as the public. *See* section 23-68-104. Only after a full hearing may a receivership be granted. At a minimum, the statutory scheme contemplates that interested parties will be given an opportunity to be heard before a receiver is appointed and a permanent order is entered.

Under the facts of this case, even if it can be said that Appellants waived their statutory rights to notice, at a minimum, they should have been provided with notice to be heard on the issue of whether the agreement had, in fact, been breached. Constitutional notions of due process require at least that much. It stretches credulity to envision the Commissioner having such complete unchallengeable authority that he not only can avoid the notice requirements of the statutes, but that he can be judge and jury on the issue of whether a breach has occurred.

Finally, what are most troubling to me are the far-reaching effects this decision will have. I fear that the agreements employed by the Commissioner in this case will be used as a template to place other insurance companies into receivership. This "procedure" offends public policy and the

very reasons ind the passage of the Uniform Act. As explained above, the Act clearly spells out the steps that the Commissioner must take before an insurer may be placed into receivership. The requirements are straightforward and simple, and, more importantly, they are the sole and exclusive means to place an insurer into receivership. It was thus error for the trial court to require anything less than compliance with the statutes.

ARNOLD, C.J., and THORNTON, J., join in this dissent.

APPENDIX B

APPENDIX B

Supreme Court of Arkansas

Nos. 00-1279, 00-1272.

Bob E. FEWELL and Holdingsco, Inc.
v.
Mike PICKENS, Receiver of American Investors Life Insurance Company.

[Filed May 3, 2001]

ORDER DENYING PETITION FOR REHEARING

Petition for Rehearing is denied.

APPENDIX C

APPENDIX C

PERMANENT INJUNCTION AND ORDER APPOINTING RECEIVER FOR REHABILITATION
(Filed July 11, 2000, at 9:09 a.m.)

On this day comes on to be heard the Petition for Appointment of Receiver filed by Mike Pickens, Insurance Commissioner for the State of Arkansas. Petitioner appeared by and through his attorney, Steve A. Uhrynowycz.

I.
FINDINGS

1. It appears to the Court that it has jurisdiction of the parties and of the subject matter herein. After considering the evidence, the Court is of the opinion and so finds that the law and the facts are as Petitioner has alleged in his Petition, and that there exists a present and urgent necessity for the entry of an Order appointing Petitioner Receiver of Respondent, to take charge of, and to preserve and protect the property, assets and records of Respondent, and to manage the business affairs of Respondent.

2. It further appears that Respondent, its officers, directors, shareholders, owners, attorneys, agents, employees and representatives, and those persons in active concert or participation with them, should be permanently enjoined from conducting Respondent's business of insurance or any other business of Respondent in this State, under any charter, permit, license, registration, certificate of authority, power or privilege of Respondent, and from in any manner wasting, disposing of, transferring, selling, assigning,

canceling, concealing or hypothecating any of Respondent's books, records, money, accounts, stocks, bonds, assets, notes, equipment, funds, accounts receivable, policies of insurance or other property, real, personal or mixed, wherever situated, which is owned by, in the possession of or claimed by Respondent.

3. In support thereof, the Court finds that Petitioner has made a prima facie case that Respondent's financial condition is impaired such that its continued operation outside the supervision of Petitioner will be hazardous to the general public, and to Respondent's insureds and creditors. The Court further finds that Respondent has consented to the entry of an order of permanent receivership without prior notice upon breach of covenants contained in May 28, 1999 Agreement and December 30, 1999 First Amended and Substituted Agreement, and that Petitioner has made a prima facie case of such breach of covenants.

II.
APPOINTMENT OF RECEIVER

It is hereby ordered that Mike Pickens, the duly appointed Insurance Commissioner for the State of Arkansas, be and hereby is appointed Receiver of Respondent, AMERICAN INVESTORS LIFE INSURANCE COMPANY, for the purpose of rehabilitation and is hereby granted and given all powers and authority under any and all statutes and under the common law of this State authorizing the appointment of a Receiver, including but not limited to the following duties and powers:

1. The Receiver is authorized and directed to take possession of all property and assets of Respondent as

described herein, of whatever nature and wherever located, or which directly or indirectly relate to the business of Respondent, including, but not limited to, any statutory or special deposits made by or for Respondent with any officer or agency of any state (R. 29-30) or the federal government, banks, savings and loan associations and other depositories, and any and all bank deposits, accounts, collateral or the contents of any safe deposit boxes in the name of or belonging to Respondent, and to take charge of and possession of the offices of Respondent and any books and records in the possession of or belonging to Respondent concerning or related to Respondent's business of insurance.

2. The Receiver is hereby granted and given all equitable powers and authority under any and all statutes and under the common law of this State authorizing the appointment of a receiver, and particularly all of the powers granted in Ark. Code Ann. § 23-68-101, et. seq., and as representative of Respondent, its policyholders, claimants and creditors, to preserve, protect and recover any assets or property of Respondent, including claims or causes of action belonging to, or that may be asserted by, Respondent.

3. The Receiver is further authorized and directed to file, prosecute and defend or settle any suit or suits heretofore filed or which may hereafter be filed by or against Respondent deemed by said Receiver to be necessary to protect any of the interested parties or any property affected thereby, and to preserve all property and assets of Respondent.

4. The Receiver is empowered to conduct the business of Respondent, to administer the operations of Respondent,

and to employ and authorize the compensation of legal counsel, accountants, financial examiners, managers, clerks and such assistants as he deems necessary, and to authorize the payment of the administrative expenses of the receivership estate, to be paid out of the funds or assets of Respondent.

5. Steve A. Uhrynowycz is hereby appointed Deputy Receiver of Respondent.

6. It is ORDERED that the Receiver appointed herein, shall be authorized to supervise, dismiss or exclude from the offices of Respondent any or all of the employees, officers, managers, owners, and/or directors of Respondent, and to employ such necessary employees and managers, and to pay their salaries, benefits and related reasonable and necessary fees out of the funds or assets of Respondent, as he deems necessary in the performance of his duties.

7. It is ORDERED that the Receiver appointed herein shall be authorized to receive, collect, control, open and review all mail addressed in any manner to Respondent.

8. It is ORDERED that the Receiver appointed herein shall be authorized to take possession of the offices of Respondent and to take possession of and remove all books and records which relate to or are connected with the business of Respondent or which belong to or are in the possession of Respondent.

IT IS FURTHER ORDERED that this Order directing the Receiver to take possession of the affairs and assets of Respondent shall continue in full force and effect until further Order of this Court.

III.
INJUNCTION

A Permanent Injunction against the following named persons and entities is hereby issued:

TO AMERICAN INVESTORS LIFE INSURANCE COMPANY; ITS OFFICERS, OWNERS, DIRECTORS, AGENTS, EMPLOYEES, SERVANTS, ATTORNEYS, ATTORNEYS IN FACT, REPRESENTATIVES, STOCK-HOLDERS, THIRD PARTY ADMINISTRATORS, AD-JUSTERS, MEMBERS, TRUSTEES, POLICYHOLDERS, MANAGERS, ASSOCIATES, AND THOSE OTHERS ACTING IN CONCERT WITH AMERICAN INVESTORS LIFE INSURANCE COMPANY.

YOU AND EACH OF YOU are hereby ENJOINED AND RESTRAINED from (R. 31-32)

1. Doing, operating and conducting Respondent's business of insurance or any other business of Respondent under any contract for services or, under any charter, certificate of authority, license, or permit, belonging to or heretofore issued to Respondent, except as authorized by the Receiver or by order of this Court;

2. Wasting, disposing of, using, transferring, selling, assigning, canceling, hypothecating or concealing, in any manner, any books, records, money, accounts, stocks, bonds, assets, notes, equipment, funds, accounts receivables, policies of insurance or other property of Respondent, wherever situated, including any claims or causes of action, owned by, in the possession of or claimed by Respondent;

3. Disposing of any account, debt, deposit, share account, trust account, or any other asset you may own, owe to, or hold for the benefit of the Respondent, or any account held individually, jointly or severally for Respondent, whether such account, debt, deposit, share account, trust account, or any other asset is owned or held in the name of or for the benefit of Respondent, or under any other name;

4. Removing from the jurisdiction of this Court, or from Respondent's place of business, any office equipment, furniture, fixtures, books, records or other property, of any kind or nature, wherever located, including but not limited to that which has been acquired, purchased or paid for by Respondent, all of which property is hereby placed in custodia legis under these provisions;

5. Interfering, in any way, with the lawful acts of the Receiver, or with these proceedings, and from commencing or prosecuting any action or appeal, including but not limited to arbitration, or from obtaining any preference, judgment, attachment, garnishment or other lien, or the making of any levy against Respondent, its assets or any part thereof and from asserting any claims against Respondent, or against the Receiver thereof, except by doing so in the receivership proceedings herein;

6. YOU AND EACH OF YOU ARE FURTHER SPECIFICALLY ENJOINED AND RESTRAINED from interfering with any effort to determine the nature, amount and location of any and all assets, books and records of Respondent, and you are further ordered to immediately surrender all such property to the Receiver or his agents.

TO ANY AND ALL BANKS, SAVINGS AND LOAN ASSOCIATIONS, TRUST COMPANIES, CREDIT UNIONS, OR ANY OTHER DEPOSITORY INSTITUTIONS AND ALL OTHER PERSONS, FIRMS, CORPORATIONS, ASSOCIATIONS, OR OTHER LEGAL ENTITIES:

YOU AND EACH OF YOU are hereby DIRECTED against:

1. Disposing of, using, releasing, transferring, withdrawing, allowing to be withdrawn or concealing in any manner, any property or assets of Respondent, or from disposing of any account, debt, deposit, share account, trust account or any other asset that you may own, owe to or hold in the name of or for the benefit of Respondent, or any account, debt, share account, trust account or any other asset, whether owned or held individually, jointly or severally for Respondent, except as authorized by the Receiver or by order of this Court;

2. Transacting the business of Respondent in any manner except as authorized by the Receiver or by order of this Court;

3. Interfering, in any way, with the lawful acts of the Receiver, or with these proceedings, and from commencing or prosecuting any action or appeal, including but not limited to arbitration, or from obtaining any preference, judgment, attachment, garnishment or other lien, or the making of any levy against Respondent, its assets or any part thereof, and from (R. 33-34) asserting any claim against Respondent, or against the Receiver thereof, except by doing so in these proceedings;

4. Doing anything, directly or indirectly, to prevent the Receiver from gaining access to, acquiring, examining or investigating any books, documents or records concerning Respondent, its affairs or assets, regardless of the name under which such assets, documents or records may be filed or wherever such books, documents or records may be found, such books, documents and records to include but not be limited to, records of banks, savings and loan associations, trust companies, or any other persons, firms, corporations, associations, depositories, or other legal entities, as well as bank accounts, or any other assets into which have been transferred, deposited, or placed, funds or other assets belonging to or payable to Respondent, or to which Respondent may have claim or title regardless of under what name such bank accounts, debts, deposits, share accounts, safe deposit boxes, trust accounts or other assets are held.

YOU AND EACH OF YOU ARE FURTHER DIRECTED against interfering in any way with the lawful acts of the Receiver who has been appointed herein, or from disposing of, converting, dissipating, or concealing in any manner any of the assets, books, property, records, or reports of Respondent.

YOU AND EACH OF YOU ARE FURTHER ORDERED to immediately surrender to the Receiver or his designated agents all property, assets, books and records of Respondent. The Court further specifically finds and orders that the Receiver is vested by operation of law with title to the rights of the Respondent as the customer of any financial institution.

IV.

OTHER ORDERS

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Receiver shall receive and take possession of all assets of Respondent on deposit with any state or federal agency.

IT IS FURTHER ORDERED that the appointment of the Petitioner as Receiver shall continue in full force and effect until further order of this Court.

SIGNED AND ENTERED this 11th day of July, 2000.

/s/ John E. Plegge, Circuit Judge

APPENDIX D

APPENDIX D

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SEVENTH DIVISION

MIKE PICKENS,
INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS

PETITIONER

VS.

CIV 2000-5833

AMERICAN INVESTORS
LIFE INSURANCE
COMPANY, AN ARKANSAS
DOMICILED COMPANY

RESPONDENT

ROBERT FEWELL AND HOLDINGSCO, INC.

INTERVENORS

ORDER

(Filed August 4, 2000)

On this 4th day of August, 2000, came before the Court the Petitioner, by and through its counsel, Friday, Eldredge & Clark, and Intervenors, by and through their attorneys, Perroni & James. After reviewing the pleadings and considering the arguments of counsel, the Court rules as follows:

1. Intervenors' Motion to Intervene is granted.
2. Intervenors' request to vacate or set aside the Permanent Injunction and Order Appointing Receiver for Rehabilitation is denied.

IT IS SO ORDERED.

/s/ John B. Plegge, Circuit Judge

APPENDIX E

APPENDIX E

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SEVENTH DIVISION

MIKE PICKENS,
INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS

PETITIONER

VS.

CIV 2000-5833

AMERICAN INVESTORS LIFE INSURANCE
COMPANY, AN ARKANSAS
DOMICILED COMPANY

RESPONDENT

ROBERT FEWELL AND
HOLDINGSCO, INC.

INTERVENORS

ORDER

(Filed October 6, 2000)

The Court finds that the statements of Mike Pickens, Receiver for American Investors Life Insurance Company, accurately reflect the proceedings before the Court on [sic] September 11, 2000 and August 4, 2000. Therefore, the Court approves those statements and finds that they should be included in the record on appeal.

IT IS SO ORDERED.

/s/John Plegge, Circuit Judge
Date: 10/6/00

[ATTACHED TO THE ORDER WAS A COPY OF THE FOLLOWING STATEMENTS OF PROCEEDINGS FOR AUGUST 4, 2000 AND JULY 11, 2000, FILED BY RESPONDENT.]

STATEMENT OF PROCEEDINGS OF AUGUST 4, 2000

Comes now Mike Pickens, Receiver of American Investors Life Insurance Company, pursuant to Rule 6 of the Arkansas Rules of Appellate Procedure-Civil, and for his Statement of Proceedings of August 4, 2000, states:

On August 4, 2000, a hearing was conducted before Judge John Plegge in connection with the Motion to Intervene and Incorporated Briefs and Motion to Set Aside Permanent Injunction and to Dismiss Supporting Brief of Bob E. Fewell and HoldingsCo, Inc. ("Intervenors"). The proceeding was not on the record since the court reporter was not available and it was necessary to conduct an expedited proceeding. Present were Patrick R. James, counsel for Intervenors, and William A. Waddell, Jr., and Steve Uhrynowycz, counsel for the Petitioner. The following events transpired in the hearings:

1. Pat James moved to allow Intervenors to intervene contending he was entitled to intervene his [sic] right pursuant to A.R.C.P. 24(a). The Motion was granted.

2. Further, Intervenors requested that the Petition be dismissed and that the permanent injunction be vacated or set aside. Intervenor stated that if the Court determined that it was appropriate for the entry of a permanent injunction then the Court could immediately re-enter the same permanent injunction.

3. Intervenor also argued that there was no basis for the entry of a permanent injunction because the figure in the actuarial report attached to the Petition for Appointment of Receiver was an estimate.

4. Steve Uhrynowycz, one of the counsel for Petitioner argued in response that a true-up number was provided to American Investors Life Insurance Company and that the true-up number was contained in the pleadings. Uhrynowycz further argued Intervenors argument failed to address the outstanding $1.4 million promissory note owed to American Investors Life Insurance Company.

5. After considering the arguments of counsel, the Court denied the Motion to Dismiss and to Set Aside the Injunction.

The above statement accurately reflects the events which occurred in the hearing on August 4, 2000.

Respectfully submitted,
/s/ William A. Waddell, Jr.

AMENDED STATEMENT OF PROCEEDINGS OF JULY 11, 2000

Comes now Mike Pickens, Receiver of American Investors Life Insurance Company, pursuant to Rule 6 of the Arkansas Rules of Appellate Procedure-Civil, and for his Statement of Proceedings of July 11, 2000, states:

1. On July 11, 2000, a hearing was conducted before Judge John Plegge in this matter. The proceeding was not on the record since the court reporter was not available and it was necessary to conduct an expedited proceeding.

Present were Steve Uhrynowycz, Deputy Receiver, and Mel Anderson. The following events transpired in the hearings:

A. Uhrynowycz and Anderson appeared before Judge Plegge in chambers. Uhrynowycz reintroduced Anderson to Judge Plegge and presented the Petition for Appointment of Receiver and attached exhibits to the Court. Uhrynowycz summarized the exhibits, including the Affidavit of Anderson, for Judge Plegge who then reviewed them. Uhrynowycz stated that demand letters (Exhibit A to the Petition) for payment of the obligations had been made and that the promissory note had not been paid and the capital deficiency of American Investors had not been cured. Uhrynowycz further stated the failure to pay the promissory note and the failure to cure the capital deficiency constituted breaches of the agreements attached to the Petition, in which event American Investors, Bob Fewell and Holdingsco had consented to immediate entry of an order granting receivership and had waived prior notice of the entry of such an order.

B. The Court asked what type of insurance business American Investors was writing. Uhrynowycz responded that the American Investors was writing health insurance primarily for large and small groups.

C. The Court also inquired whether there was any indication that Fewell would pay the note and cure the capital deficiency. Uhrynowycz responded that his understanding was as outlined in Jay Morgan's letter attached to the Petition which he then related to the Court.

D. The Court inquired as to what the Receiver's plans for American Investors would be. Uhrynowycz responded that the Receiver planned to review the records of American Investors and determine whether the company could be rehabilitated. He also advised that the Receiver intended to engage an Arizona company to help manage American Investors and that the Receiver intended to attempt to catch up the claims backlog.

E. The Court then asked for an order which was presented, signed and filed of record.

2. The above statement accurately reflects the events which occurred in the hearing on July 11, 2000.

Respectfully submitted,
/s/ William A. Waddell, Jr.

APPENDIX F

APPENDIX F

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SEVENTH DIVISION

MIKE PICKENS,
INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS

PETITIONER

VS.

CIV 2000-5833

AMERICAN INVESTORS LIFE INSURANCE
COMPANY, AN ARKANSAS DOMICILED COMPANY

RESPONDENT

ROBERT FEWELL AND HOLDINGSCO, INC.
INTERVENORS

PETITION FOR THE APPOINTMENT OF RECEIVER

(Filed July 11, 2000, 9:08 a.m.)

Comes now Mike Pickens, Insurance Commissioner for the State of Arkansas, and for his Petition for the Appointment of Receiver, states:

1. The Petitioner is the duly appointed Insurance Commissioner for the State of Arkansas.

2. Respondent is a legal reserve stock insurer, domiciled in Arkansas and authorized to transact the business of insurance in the State of Arkansas.

3. Petitioner has determined that Respondent is impaired as defined in Ark. Code Ann. § 23-68-102(1). The impairment of Respondent has not been cured despite demand from Petitioner to the owner of the parent company of Respondent, Bob E. Fewell ("Fewell"). Attached hereto as "Exhibit A" and incorporated herein are copies of June 30, 2000 and July 5, 2000 letters from Arkansas Insurance Department to Fewell's attorney demanding the impairment be cured, which letters are included only for the purpose of showing demand to cure on Fewell. Pursuant to May 28, 1999 Agreement and December 30, 1999 First Amended and Substituted Agreement among Petitioner on behalf of Arkansas Insurance Department, Respondent, Holdingsco, Inc. (Parent of Respondent) and Fewell, Respondent has agreed to the entry of an order of permanent receivership without prior notice in the event of a breach of said Agreement and First Amended and Substituted Agreement. Fewell's failure to cure the impairment of Respondent is a breach of said Agreement and of said First Amended and Substituted Agreement. Attached hereto as "Exhibit B" and incorporated herein is Affidavit of Mel Anderson, Assistant Commissioner for Financial Regulation, Arkansas Insurance Department stating that the impairment of Respondent in fact has not been cured.

4. Petitioner should be appointed Receiver of Respondent for the purpose of rehabilitation pursuant to Ark. Code Ann. § 23-68-106.

5. A permanent injunction should be issued pursuant to Ark. Code Ann. § 23-68-105 restraining the Respondent, its officers, directors, stockholders, owners, agents, employees and all other persons from the transaction of Respondent's business, from the waste or disposition of

its property, from the interference with the Petitioner or this proceeding, from the commencement or prosecution of any actions, the obtaining of any preferences, judgments, attachments or other liens, or from the making of any levy against the Respondent, its assets, or any part thereof.

6. The Petitioner, his deputies, agents and such other persons as the Commissioner may designate or employ to assist him in performing his responsibilities in this matter should be authorized to take possession and control of the assets of Respondent and to direct the operations of Respondent.

WHEREFORE, Petitioner prays that the Court issue an Order appointing Mike Pickens, Insurance Commissioner for the State of Arkansas, as Receiver of Respondent for the purpose of rehabilitation; that he be authorized to take possession of the offices, funds, business books, records, accounts and all other assets of Respondent, and to take whatever action he deems necessary or expedient to marshal the assets of Respondent and to rehabilitate its business; further, that the officers, directors, shareholders, owners, employees and agents of Respondent be enjoined from the disposition or hypothecation of any of the assets, books or records of Respondent be enjoined from transacting any of the business of Respondent except as allowed by the Receiver; that the Receiver, his deputies, agents and employees be authorized to seize and hold any and all assets of Respondent; for his costs herein expended; and for all other relief to which he may be entitled.

Respectfully submitted,
Mike Pickens, Insurance Commissioner for the State of Arkansas
by: /s/ Steve A. Uhrynowycz

Exhibit A Was Two Letters From Jay Morgan To Sam Perroni Dated June 30, 2000, and July 5, 2000

Re: American Investors Life Insurance Company (the "Company") and its Sole Shareholder Bob Fewell

Dear Mr. Perroni:

I am in receipt of, and appreciate receiving, your letter of June 29, 2000. I regret hearing Mr. Fewell will not be fulfilling his obligation to pay by today's due date his December 30, 1999, promissory note owing to the Company. While I recognize you have only recently been retained to represent Mr. Fewell, Mr. Fewell and his previous counsel have been well aware of this obligation for six (6) months. As soon as the Company paid out greater than $7.7 Million in 1999 incurred claims, management and, we trust ownership, knew the entire $1.4 Million obligation was payable in full. As evidenced by the Milliman & Robertson/Rex Durrington report dated June 15, 2000, which was communicated to the Company on June 16, 2000 and handed to the Company's President, Randy Coleman, on June 19, 2000, the Company had previously paid out $9.9 Million in 1999 incurred claims. I regret you feel you are not in a position to advise Mr. Fewell to take any action. What advice could you possibly give him, other than that he should honor his legal commitment to the Company and its policyholders? At the conclusion of Deputy Commissioner Anderson and my meeting with you and your law partner on Wednesday, June 29, 2000, I trusted we all understood the serious solvency problem facing the Company and the need for immediate action as required by law to protect policyholders.

As I know you are already aware from our discussions on Wednesday, the Company's financial statements for 1999 reflect your client's $1.4 Million collateralized promissory note as one of its admitted assets. The Company has a serious solvency problem in that over and above the $1.4 Million obligation owed under the note (which will be in default at the end of today and no longer an admitted asset) your client owes an additional contribution to surplus as of December 31, 1999, in the amount of $4.2 Million pursuant to his agreement. I note your letter does not address that additional $4.2 Million contribution, but all indications and recent representations from both you and your client have indicated he has no intentions of honoring Paragraph 4 of our May 28, 1999, agreement (as amended December 30, 1999). Laying aside the needed $4.2 Million, your letter does address the $1.4 Million obligation and you have acknowledged that money is due and payable today, June 30, 2000.

Please be formally advised of the fact that the failure to pay the $1.4 Million by the close of business today will be an event of default under the promissory note, and will be a breach of covenant under the agreement. Paragraph 6 of the agreement your client, as well as the Company and its parent company agreed and consented to, mandates the immediate commencement of receivership against the Company upon breach of any one (1) of the agreement's covenants. We understand the Company has informed you it will make formal demand for the immediate payment of the note. If your client has not paid to the Company the $1.4 Million by the close of business Monday, July 3, 2000, the Department will proceed to court and commence receivership action pursuant to Paragraph 6 of the agreement.

The Department has determined this action is not only warranted by our agreement, but is consistent with our statutory mission and responsibility of consumer protection through insurer solvency and market conduct regulation. Given Mr. Fewell's unwillingness to cure the $4.2 Million deficiency, you described a prospective purchaser as being the only possible solution, and requested the Department forebear action until a determination can be reached as to the prospective purchaser's willingness to address this problem. I expressed the obvious desire the Department has to speak to the prospective purchaser, and you indicated you would encourage your client to see that such a discussion takes place. The Department has since requested of the Company's counsel that the prospective purchaser immediately call us. The Company's counsel related to the Department yesterday that he had discussed the matter with the Company's broker, who was instrumental in putting the Company and the prospective purchaser together. The broker indicated to the Company's counsel, and the Company's counsel indicated to the Department, that the prospective purchaser is counting on your client to cure the $4.2 Million deficiency so that capital could at a minimum be $115,000, as statutorily required, before the prospective purchaser goes forward.

While the Department still awaits a phone call from the prospective purchaser, it does not intend to wait past Monday, July 3, 2000, and to date neither your client nor the Company has proposed a viable solution to the Company's solvency problem. In fact, you and your client have indicated he is not willing to solve the problem and the broker has indicated the signatory to the letter of intent is unwilling to cure this problem. The Department is seriously concerned that further delay and lack of disclosure of the problem to the public and the court in a timely manner will be more harmful to consumers. Of course, the Department will zealously

protect consumers to the fullest extent possibly by law.
Sincerely,
/s/ Jay Morgan, General Counsel

cc:
Nick Thompson, Mitchell, Williams, Selig, Gates & Woodyard
Mike Pickens, State Insurance Commissioner
John Hartnedy, Deputy Commissioner & Life and Health Actuary
Bob Ridgeway, Deputy Commissioner
Mel Anderson, Deputy Commissioner for Financial Regulation/Audit
Booth Rand, Associate Counsel, Legal Division

Re: American Investors Life Insurance Company (the "Company")
and Your Client, Bob Fewell

Dear Mr. Perroni:

As an update to my letter of June 30, 2000, I wanted to advise you that on Monday, July 3, 2000, the Department did receive a call from the individual referred to in my June 30, 2000, letter as the "prospective purchaser." This gentleman informed the Department he has no intention of curing the Company's existing surplus deficiency and that his letter of intent had expired Friday with your client, Mr. Fewell, choosing not to sign it. Since you indicated during our June 28, 2000, meeting that your client would not cure the surplus deficiency, and that this prospective purchaser was the only hope for a cure, the Department assumes no cure of the surplus deficiency will occur. You should immediately contact me if this assumption is not correct.

The Department has notified you that your client's failure to pay the 12/30/99 promissory note is a breach of his agreement and amended agreement. This Department cannot and will not wait indefinitely for you to advise your client on this matter. Your client's obligation to his Company and its policyholders are clear. I look forward to hearing from you very soon in this regard.

Sincerely,

/s/ Jay Morgan, General Counsel

cc:

C. Nicholas Thompson, Mitchell, Williams, Selig, Gates & Woodyard (via facsimile)
Mike Pickens, State Insurance Commissioner
John Hartnedy, Deputy Commissioner & Life and Health Actuary
Bob Pidgeway, Deputy Commissioner
Mel Anderson, Deputy Commissioner for Financial Regulation/Audit
Booth Rand, Associate Counsel, Legal Division

Exhibit B Was An Affidavit of Mel Anderson

Before the undersigned, duly qualified and acting in and for said county and state, appeared Mel Anderson to me well known to be the affiant herein, who stated the following under oath:

1. My name is Mel Anderson. I am a certified public accountant with over 12 years experience in the insurance industry, 10 of which have been as an insurance regulator. I am the Deputy Commissioner for Financial Regulation/ Audit for the Arkansas Insurance Department ("Department") and have had this position for approximately 2 years. Included among my duties as Deputy Commissioner is the monitoring of Arkansas domestic

companies and foreign insurance companies authorized to do business in Arkansas to ensure that those companies are operating in compliance with the financial requirements of the Arkansas Insurance Code.

2. For approximately the last two years, the Department has closely monitored the financial solvency of American Investors Life Insurance Company ("American Investors"), an Arkansas domiciled insurer which writes health insurance. American Investors is owned by Holdingsco, Inc. and Holdingsco, Inc. is owned by Bob E. Fewell ("Fewell"). Under current law, American Investors is required to maintain a minimum capital and surplus requirement of $115,000.00.

3. As a result of operations ending December 31, 1998, American Investors had a capital surplus deficiency of $2,935,000.00. The Department, American Investors, Holdingsco, Inc. and Fewell entered into an Agreement dated May 28, 1999 which, among other things, cured the December 31, 1998 capital surplus deficiency of American Investors and contained the personal guarantee of Fewell that American Investors would meet its minimum capital and surplus requirement of $115,000.00 for operations ending December 31, 1999. A copy of the May 28, 1999 Agreement is attached hereto and marked as Exhibit 1.

4. As a result of misunderstanding regarding certain obligations of Fewell under the May 28, 1999 Agreement, the Department, American Investors, Holdingsco, Inc. and Fewell entered into First Amended and Substituted Agreement dated December 30, 1999. Pursuant to the First Amended and Substituted Agreement, Fewell executed a promissory note dated

December 30, 1999 payable to American Investors in the amount of $1,407,802.63. Furthermore, Fewell's affirmed his personal guarantee that American Investors would meet its minimum capital and surplus requirement of $115,000.00 for operations ending December 31, 1999. A copy of the December 30, 1999 First Amended and Substituted Agreement is attached hereto and marked as Exhibit 2. A copy of Fewell's December 30, 1999 promissory note is attached hereto and marked as Exhibit 3.

5. Fewell's ultimate liability under the December 30, 1999 promissory note was subject to adjustment by and his personal liability for American Investors' operations ending December 31, 1999 was determined by the calculation of the "1999 Reserve True Up" which is defined in the First Amended and Substituted Agreement as ". . .the difference betwen the actual amount of claims reserves utilized to pay all just and valid claims incurred by the Company in 1999 and the claim reserve of Seven Million Seven Hundred Thirteen Thousand Nine Hundred Twenty Dollars ($7,713,920.00) posted by the Company on December 30, 1999 for 1999 incurred claims." (pg. 3, para (b)(i) First Amended and Substituted Agreement).

6. Attached hereto and marked as Exhibit 4 is Review of Claims Reserves for American Investors Life Insurance Company dated June 28, 2000 from Martin F. Gibson, Consulting Actuary, who examined the December 31, 1999 claims reserves of American Investors pursuant to Ark. Code Ann. §§23-61-201, et seq. The report sets American Investors total claims reserves as of December 31, 1999 at $12,183,000.00. The result of the report was that Fewell's December 30, 1999

promissory note to American Investors was not adjusted and $1,407,802.63 plus accrued interest was due and payable from Fewell to American Investors on June 30, 2000, and further that American Investors operations for the period ending December 31, 1999 resulted in a capital deficiency of $4,206,773.00 thereby triggering Fewell's personal guarantee.

7. To the best of my knowledge, Fewell, despite demands from American Investors and from the Department, to date has failed to pay American Investors the amount due pursuant to the December 30, 1999 promissory note and has further failed to cure the December 31, 1999 capital deficiency in the amount of $4,206,773.00 of American Investors.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of July, 2000.
/s/ Mel Anderson

Exhibit 1 to the Affidavit Was A Document Titled "Agreement"

This Agreement is entered into this 28th day of May, 1999, by and among American Investors Life Insurance Company (the "Company"), the Company's sole shareholder, Holdingsco, Inc. (the "Parent"), Bob E. Fewell, Individually ("Fewell"), and the Arkansas Insurance Department (the "Department").

WHEREAS, based upon financial information of the Company presented by the Company to the Department to date and in connection with the financial data acquired by the Department during a financial examination of the Company pursuant to Ark. Code Ann. §23-61-201, it has been

determined that a two million nine hundred thirty-five thousand dollar ($2,935,000.00) capital surplus deficiency must be immediately cured in order for the Company to be considered solvent as of December 31, 1998.

WHEREAS, the Company, Fewell and the Department have entered into a certain Consent Order dated April 30, 1999, under which the Company is currently obligated to file its 1998 Annual Statement with the Department on or before May 30, 1999;

WHEREAS, the Company has, pursuant to the Consent Order of April 30, 1999, requested an extension to filing its 1998 Annual Statement and has submitted Fewell's promissory note and independent written verification of an impending funds transfer and, said request having been granted until June 7, 1999;

WHEREAS, as established in the aforesaid Consent Order the Company and Fewell have previously acknowledged, agreed and consented to the immediate commencement of permanent receivership proceedings, and consented to the entry of an Order providing for the immediate receivership of the Company should the Company file its 1998 Annual Statement showing an impairment or insolvency without having cured same prior to the filing of the Annual Statement.

NOW THEREFORE, in consideration of the Department's forbearance with respect to the commencement of receivership or liquidation proceedings against the Company, the Company, the Parent and Fewell covenant and agree as follows:

1. With respect to making good the aforestated two million nine hundred thirty-five thousand dollar ($2,935,000.00) capital surplus deficiency, on or before 4:30 p.m. Central Standard Time, June 7, 1999, Fewell will:

(a) Deposit two million six hundred thousand dollars ($2,600,000.00) in cash into the Company, providing the Department with acceptable proof or receipts thereof; and

(b) Execute a three hundred thirty-five thousand dollar ($335,000) Promissory Note payable to the Company on demand, but if no demand is made, on or before December 31, 1999, which Note shall bear interest at the rate of 4.9%, and shall be fully secured, properly perfected and collateralized with property, which property shall be sufficient and acceptable to the Department in every respect, including its form, its market value, title and encumbrances, if any, so that said property when pledged and assigned to the Company shall be an admissible asset of the Company under the Arkansas Insurance Code. On June 7, 1999 the Company and Fewell shall present to the Department documentation of the aforestated infusion of capital into the Company showing that any impairment or insolvency, as of December 31, 1998, has been cured.

(c) In consideration for Fewell's execution and performance under the terms of the three hundred thirty-five thousand dollar ($335,000) promissory note obligation, the Company shall present to Fewell a surplus note in the same amount, which note will have terms acceptable to the Commissioner.

(d)The Company shall file its 1998 Annual Statement on or before June 7, 1999, reflecting the Company as solvent as of December 31, 1998.

2. On or before June 15, 1999, the Company shall file with the Department its March 31, 1999 financial information with an actuarial opinion as required by the Department. The Company, Parent, and Fewell all agree that the following listed requirements will be satisfied and the Company shall therefore meet its minimum capital and surplus requirements for the year 1999 under the Arkansas Insurance Code:

(a) With respect to all 1999 first quarter capital and surplus deficiencies (as may be reflected by the aforestated financial information filing and with respect to losses reflected therein and any examination adjustment), Fewell hereby agrees that such losses and capital shortfalls shall be cured to the satisfaction of the Department by Fewell executing aa second Promissory Note payable to the Company in the amount of said losses/deficiencies, bearing interest at the rate of 4.9% per annum, and being payable over a seven month period of time in equal monthly payments of cash into the Company, with the first of the seven payments beginning on or before June 30, 1999 and with the last of the seven payments being made on or before December 31, 1999. Fewell, the Company and the Parent further agree that the aforestated Promissory Note will be collateralized and fully secured with sufficient collateral whose form and market value must be acceptable to the Department and sufficient to enable said note to be an admitted asset of the Company and be otherwise acceptable to the Commissioner under Ark. Code

Ann. §23-69-172(c). Fewell shall have the right to substitute collateral subject to the approval of the Commissioner. Additionally, solvent quarterly financial statements of the Company shall also be filed as required by the Arkansas Insurance Code.

(b) The amounts of the aforesaid monthly payments may be adjusted or reduced by an amount determined by the Department to be acceptable after reviewing the Company's monthly financial statements or records provided by the Company or its management and as filed with the Department.

(c) In consideration for Fewell's execution and performance under the terms of the Promissory Note and obligations described in Paragraph 2(a) above, the Company shall present to Fewell a surplus note in the same amount, which note will have terms acceptable to the Commissioner.

3. With respect to any additional losses, capital deficiencies or impairments identified or made known to the Department through the Company's required submissions of financial information to the Department from the second quarter of 1999 through December 31, 1999, Fewell hereby agrees to fund such losses and make good such deficiencies, with equivalent cash infusions on a monthly basis, as such losses and deficiencies occur, within ten (10) days after notification by the Department specifying the amount of the deficiency, loss or impairment for the applicable period.

4. Fewell hereby personally guarantees the Company will meet the one hundred fifteen thousand dollar ($115,000.00) minimum capital and surplus requirement as of

December 31, 1999 and that any shortfall will be contributed by Fewell in order to cure the shortfall prior to the filing of the Company's December 31, 1999 Financial Statement.

5. Provided there is continuous and complete compliance with each and every covenant of the Company, the Parent and Fewell set forth herein, and provided the Company is otherwise unimpaired and solvent and is otherwise in compliance with Arkansas law, the Department shall:

(a) Forebear from commencing receivership proceedings;

(b) Consider granting certain reasonable extension requests with respect to the Company's filing of 1999's Quarterly Statements; and,

(c) Grant the Company an exemption from risk based capital requirements for the calendar year 1999.

However, the Department reserves its ability to exercise any and all of its statutory obligations to commence receivership or liquidation proceedings or otherwise take appropriate action against the Company for violations or activities of the Company not related to the failures of any of the parties to perform under this agreement.

6. However, upon breach of any one of the aforesaid covenants, the Company, the Parent and Fewell hereby agree and consent to the immediate commencement and entry of an order granting receivership against the Company by the Department under Ark. Code Ann. § 23-

68-101 through § 23-68-132 and waive prior notice of entry of an order of permanent receivership.

7. Pursuant to Ark. Code Ann. § 23-61-103(c)(2) and §23-61-207, this Agreement is deemed confidential and privileged and shall not be made open to the public unless and until proceedings (as authorized herein and/or the April 30, 1999 Consent Order) are commenced.

8. The promissory notes given in furtherance of the terms of this Agreement are deemed by the Commissioner not to be in violation of Ark. Code Ann. § 23-63-833.

9. The Parent and Fewell agree to submit to the Department a personal financial statement from Fewell, and a financial balance sheet from the Parent which shall sufficiently provide to the Department an accurate statement of their respective assets and liabilities as of the date of the agreement. Fewell's personal finaicial statement shall be deemed confidential and privileged and shall be returned to him when he and the Company have fulfilled their obligations hereunder.

10.(a) The Company will report a claim lag and reserve study to the Department on a quarterly basis until further notice. The actuary will provide a Section 7 type actuarial opinion as of March 31, 1999, June 30, 1999 and September 30, 1999. This is to be provided by the Company on a confidential analysis basis.

(b) The Company will begin as soon as possible to revise their business plan through the end of 1999 and append this plan with a longer-term projection plan. The Company will show a plan that includes reaching the acceptable risk based capital level in the future.

The Company agrees to complete this long-term projection report by August 1, 1999.

(c) The Company will provide an interim monthly balance sheet and summary of operations by the 20th day of the following month through at least year-end 1999 on a confidential basis.

11. Except for those terms as may be specifically incorporated above, this Agreement is intended to replace the obligations that would otherwise exist under the June 30, 1999 letter agreement among the Company, Fewell and the Department.

Witness our hands and seals this 28th day of May, 1999.
American Investors Life Insurance Company Holdingsco, Inc.
By: /s/ Randy Coleman, President /s/ Bob E. Fewell, President

Arkansas Insurance Department
By: /s/ Mike Pickens, Insurance Commissioner, State of Arkansas

/s/ Bob E. Fewell, Individually

Exhibit 2 to the Affidavit Was A Document Entitled First Amended and Substituted Agreement

This First Amended and Substituted Agreement is entered into this 30th day of December, 1999, by and among American Investors Life Insurance Company (the "Company"), the Company's sole shareholder, Holdingsco, Inc. (the "Parent"), Bob E. Fewell, individually ("Fewell"), and the Arkansas Insurance Department (the "Department").

Whereas, on or about May 28, 1999, the parties hereto entered into a certain agreement (the "Agreement"), in which Agreement the Company, the Parent and Fewell, in consideration of the Department's forbearance with respect to the commencement of receivership or liquidation proceedings against the Company, agreed to take certain action and make such payments as are more fully set forth in the Agreement; and

Whereas, as a result of a misunderstanding regarding the payment obligations of the Promissory Note provided for in paragraph 2 of the Agreement, and the terms of the surplus notes called for in the Agreement, no payments have been made by Fewell and no repayments have been made by the Company in connection therewith; and

Whereas, Fewell and the Company respectfully submitted a request to the Department for additional time in which to meet the obligations set forth in the Agreement; and

Whereas, the Department, without waiving any rights under the Agreement, is willing to grant such request; and

Whereas, in furtherance of the Agreement and in order to make certain clarifications and correct any misunderstandings among the parties as to the duties and obligations owed under the terms of the Agreement, the parties hereby enter into this First Amended and Substituted Agreement (the "Amended Agreement").

Now, Therefore, in consideration of the premises and understandings set forth in this Amended Agreement and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. The Promissory Note in the amount of Three Hundred Thirty-Five Thousand Dollars ($335,000.00) dated June 7, 1999, signed by Fewell called for pursant to paragraph 1(b) of the Agreement and attached hereto as Exhibit "A," is hereby paid by the execution of the Promissory Note attached hereto as Exhibit "B."

2. Accordingly, the Surplus Note, dated June 7, 1999, and attached hereto as Exhibit C, executed by Fewell and Company with respect to Exhibit A is terminated, and in accordance with paragraphs 1(c) of the Agreement, Fewell and the Company have executed a Surplus Note, a copy of which is attached hereto as Exhibit "D," the terms of which are acceptable to the Commissioner with respect to Exhibit B.

3. Subparagraphs 2(a), (b), and (c) of the Agreement are hereby amended and shall read in full as follows:

> (a) With respect to all 1999 capital and surplus deficiencies (as may be reflected by the aforestated and any subsequent financial statement filings and with respect to losses reflected therein and any examination adjustment), Fewell hereby agrees that such losses and capital shortfalls shall be cured to the satisfaction of the Department by:

1. Fewell contributing cash to the Company in the amount of Eight Hundred Thirty Five Thousand Eight Hundred Forty Four Dollars and One Cent ($835,844.01) together with an interest payment of Thirteen Thousand One Hundred Twenty Six Dollars and Fifty One Cents ($13,126.51) in consideration of the Company accepting this sum, along with Fewell's execution of the

Promissory Note attached hereto as Exhibit H, as payment in full of the obligations under the Promissory Note signed by Fewell in the amount of $1,450,000.00 and dated June 21, 1999, which is attached hereto as Exhibit "E;"

2. In further consideration of the cash contribution by Fewell set forth in subparagraph 2(a)(1) above, Fewell and Company agree to terminate the $1,450,000 Surplus Note dated June 21, 1999 attached as Exhibit "F" hereto and Fewell and Company have executed a Surplus Note in the amount of Eight Hundred Forty Eight Thousand Nine Hundred Seventy Dollars and Fifty Two Cents ($848,970.52), a copy of which is attached hereto as Exhibit "G," the terms of which are acceptable to the Commissioner.

3. In further consideration of the provisions of subparagraph 2(a)(1) above, Fewell has executed a Promissory Note payable to the Company in the amount of One Million Four Hundred Seven Thousand Eight Hundred Two Dollars and Sixty Three Cents ($1,407,802.63), bearing interest at the rate of Four and Nine-Tenths Percent (4.9%) per annum, and being payable pursuant to the terms of the Promissory Note attached hereto as Exhibit "H." The Promissory Note attached hereto as Exhibit "H" is collateralized and fully secured with sufficient collateral whose form and market value must be acceptable to the Department and sufficient to enable said note to be an admitted asset of the Company and be otherwise acceptable to the Commissioner under Ark. Code Ann. § 23-69-132(a). Fewell shall have the right to substitute collateral subject to the approval of the Commissioner.

(b) The amounts due under the terms of the One Million Four Hundred Seven Thousand Eight Hundred Two Dollars and Sixty Three Cents ($1,407,802.63) Promissory Note, as provided for in subparagraph 2(a)(3) above, and attached hereto as Exhibit "H," may be adjusted as follows:

(i) by reducing the principal amount due in an amount equal to the difference between the actual amount of claims reserves utilized to pay all just and valid claims incurred by the Company in 1999 and the claim reserve of Seven Million Seven Hundred Thirteen Thousand Nine Hundred Twenty Dollars ($7,713,920.00) posted by the Company on December 30, 1999 for 1999 incurred claims. This difference in reserve amount, if any, shall be calculated on or before June 30, 2000 ("1999 Reserve True Up");

(ii) by reducing the principal amount due in an amount equal to the addition of any statutory admissible assets of the Company as a result of any future restructuring of the Company's current ownership in affiliate common stock of AILIC Asset Company, Inc. in the amount of Three Hundred Seventy Three Thousand Six Hundred Sixty Nine Dollars ($373,669.00) which has been non-admitted pursuant to the Company's Examination Report as of December 31, 1998; and

(iii) by reducing the principal amount due in an amount equal to the addition of any statutory admissible assets of the Company as a result of any future restructuring of a certain Service Agreement between the Company and Fewell and Associates

and any future restructuring of receivables due the Company from Fewell and Associates Three Hundred Forty Three Thousand Sixty Five ($343,065.00) of which has been non-admitted pursuant the Company's Examination Report of December 31, 1998.
Any interest due under Exhibit "H" shall be calculated based upon the amount of principal determined to be due thereunder or fractional part thereof resulting from any reduction adjustments that may occur pursuant to subparagraphs (i), (ii), and (iii) of this subparagraph 2(b).

(c) In Further consideration for Fewell's execution and performance under the terms of the Promissory Note and obligations as set forth in Exhibit "H" and subparagraph 2(a) and (b) above respectively, Fewell and Company have executed a Surplus Note in the same amount, a copy of which is attached hereto as Exhibit "I" the terms of which are acceptable to the Commissioner.

4. Paragraph 4 of the Agreement is hereby amended and shall read as follows:

Fewell hereby personally guarantees the Company will meet the One Hundred Fifteen Thousand Dollar ($115,000.00) minimum capital and surplus requirement as of December 31, 1999, and that any shortfall will be contributed by Fewell in order to cure any shortfall resulting from the 1999 Reserve True Up, referred to in subparagraph 2(b) above.

5. The third sentence in paragraph 10(b) of the Agreement is hereby amended as follows: The

Company agrees to complete this business plan and long term projection report by on or before January 30, 2000.

6. The Insurance Commissioner for the State of Arkansas and the Department have agreed that the Company may, in lieu of its continuing salary to Fewell, repay its Surplus Note indebtedness to Fewell under Exhibits D, G, and I in an amount equal to Fewell's annual salary. This annual salary is Three Hundred Thousand Dollars ($300,000.00) and the Company will pay Fewell an aggregate of Twenty-Five Thousand Dollars ($25,000.00) per month for all Surplus Note debt repayments under Exhibits D, G, and I; provided, however, the Company, at all times, maintains a minimum capital and surplus of One Hundred Fifteen Thousand Dollars ($115,000.00). The Company, Fewell and the Department have agreed that Company shall no longer pay Fewell a salary, if Fewell elects to repay the Surplus Notes indebtedness as allowed under this paragraph 6, until such Surplus Notes debt repayment under Exhibits D, G, and I have been satisfied in full under terms os such Surplus Notes and this Agreement.

7. Unless modified herein, all other portions of the Agreement remain in full force nd effect, are hereby ratified, and incorporated herein by reference.

In witness whereof, the parties hereto have hereunto set their hands and affixed their seals as of the date set forth above.

American Investors Life Insurance Company
By: /s/ Randy Coleman, President

Holdingsco, Inc.
By: /s/ Bob E. Fewell, President
/s/ Bob E. Fewell, Individually

Arkansas Insurance Department
By: /s/ Mike Pickens, Insurance Commissioner
for the State of Arkansas

Exhibit 3 to the Affidavit Was a Documents Entitled "Promissory Note"

$1,407,802.63 Little Rock, Arkansas

December 30, 1999

For value received, Bob Fewell promises to pay to the order of American Investors Life Insurance Company ("Insurer") the sum of One Million Four Hundred Seven Thousand Eight Hundred and Two Dollars and Sixty Three Cents ($1,407,802.63) together with interest from date until maturity or default at the rate of Four and Nine-Tenths Percent (4.9%) per annum, and thereafter until paid at the rate of Four and Nine-Tenths Percent (4.9%) per annum, due and payable as follows:

Payable in full on or before June 30, 2000.

Provided, however, that the principal and applicable interest due hereunder may be reduced or offset in accordance with the provisions of subparagraph 2(b) of that certain agreement dated May 28, 1999 as amended on December 30, 1999 by and between Bob Fewell, American Investors, Holdingsco, Inc., and the Arkansas Insurance Department, which agreement is incorporated herein by reference and made a part hereof.

Both principal and interest under this note shall be payable at 10 Shackleford Plaza, Little Rock, Arkansas 72211, or such other place as the holder may designate in writing.

The payment of this note is secured by a mortgage and security agreement lien interest dated October 15, 1999 in certain real and personal property located in Garland County, Arkansas, as per the mortgage and security agreement attached hereto as Exhibit "A."

In the event of a default continuing for a period of 30 days in the payment of any installment or any part thereof or any extensions or renewal thereof when same becomes due or upon failure to perform or comply with any of the covenants or agreements contained in the mortgage and security agreement given to secure payment of this note, the holder of this indebtedness shall have the option to declare the entire indebtedness to be immediately due and payable and the same shall thereafter bear interest at the rate of Four and Nine-Tenths Percent (4.9%) per annum until paid. Notice of the exercising of said option is hereby waived and no delay in the exercise of it shall be construed as a waiver of such right and said option may be exercised at any subsequent time during default.

The maker hereof agrees to indemnify the holder of this note for all reasonable attorneys' fees which are incurred for services actually rendered in the collection of this note provided that such fee shall not exceed 10% of the amount of principal plus accrued interest due.

This note is given and received as evidence of the indebtedness recited herein and not in satisfaction thereof.

/s/ Bob Fewell

Exhibit 4 to the Affidavit Was A Faxed Document to Mel Anderson From Patrick Caughlan on 6/30/00

Date: June 28, 2000
To: Pat Caughlan, Eoshealth
From: Martin F. Gibson, Consulting Actuary
Re: Review of Claims Reserves for American Investors Life Insurance Company

The purpose of this review is to determine health claims reserve levels for American Investors Life Insurance Company (AILIC) for the periods ending December 31, 1999, March 31, 2000, and May 31, 2000, in order to accomplish this, I have reviewed three years of medical claims lag date and certain claims analyses for the period ending May 31, 2000.

I have relied upon the date and the accuracy of that date supplied by Eoshealth and Milliman & Robertson (M&R). I did not audit or verify the date or other analysis provided to me. Milliman & Robertson performed a limited reasonableness and consistency review of the data used in their analysis that was the basis for the lag data used in this review. M&R did not find any material defects in the data. Note that if the underlying data provided is inaccurate or incomplete, the results of this review may also be inaccurate or incomplete.

In other respects, my review included the development of actuarial assumptions and the use of actuarial methods as I considered necessary in the circumstances.

Reasonableness of Results

The results of my analysis are dependent on the consistency of the claims experience during the period studied. I have been informed that a new claims payment system was installed during 1999. Also, I have been informed that normal claims payment cycles were altered during 1999 and 2000 due to cash flow problems at AILIC. These factors alone affect the reliability of actuarial estimates of claims reserves. Together these factors make it very difficult to "smooth" fluctuations in lag patterns and make accurate actuarial estimates of claims reserves.

Therefore, more reliance should be placed on reserve estimates that are primarily based on actual claims runout. Since the December 31, 1999 claims reserve estimate is based on five months of claims runout, the reserve estimate for the period ending on this date is more reasonable than the estimate for the period ending March 31, 2000 which is based on only two months of runout, or the estimate for May 31, 2000 which is based on no claims runout.

Summary of Results

My review focused on medical claims without prescription drug claims; drug claims were not reviewed. Also, I did not review any information that would allow me to make an estimate of duplicate claims. Therefore, I relied on M&R's estimates for drug claims and duplicate claims reserves as shown below.

The following table shows the results of my review:

Amounts in 000's	As of 12/31/99	As of 3/31/00	As of 5/31/00
Claims Runout	$9,907	$4,459	$0
Remaining Liability Estimate	$2,176	$8,864	$13,666
Duplicates	($100)	($500)	($800)
Drug Liability	$200	$200	$200
Total Claims Reserves	$12,183	$13,023	$13,066

The reserves do not include any amounts for margin or claims settlement expense.

In my opinion, the estimates prepared in this review are reasonable and are consistent with the recent M&R limited scope review.

/s/ Martin F. Gibson, ASA, MAAA

June 28, 2000

APPENDIX G

APPENDIX G

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SEVENTH DIVISION

MIKE PICKENS,
INSURANCE COMMISSIONER FOR THE
STATE OF ARKANSAS

PETITIONER

VS.

CIV 2000-5833

AMERICAN INVESTORS LIFE INSURANCE
COMPANY, AN ARKANSAS
DOMICILED COMPANY

RESPONDENT

ROBERT FEWELL AND HOLDINGSCO, INC.

INTERVENORS

**MOTION TO INTERVENE AND
INCORPORATED BRIEF**

(Filed July 31, 2000)

Comes the Movants, Bob E. Fewell and Holdingsco, Inc., by and through their attorneys, Perroni & James, and for their Motion to Intervene state as follows:

1. Movants are shareholders of Respondent.

2. On July 11, 2000, Petitioner moved for a permanent injunction and an order appointing a

receiver to take over the operations of Respondent for purposes of rehabilitation of Respondent.

3. One minute after the filing of the Petition herein, the Court granted the relief and entered a Permanent Injunction and ordered a receiver for rehabilitation of Respondent.

4. Movants were not made a party to the litigation although their interests will be materially affected by the ultimate outcome.

5. As the Receiver is now in control of the operations of Respondent, there is no one to either object to or prosecute an appeal of the Order entered against the Respondent, and ultimately against the interests of Movants.

6. By failing to name Movants as parties, the Petitioner has strategically and effectively blocked any such objection or appeal.

7. Attached hereto as Exhibit A and incorporated by reference is a Motion to Set Aside Permanent Injunction and To Dismiss and Supporting Brief for purposes of objecting and/or prosecuting an appeal of the July 11, 2000 Order granting a permanent injunction and appointing a receiver. Movants will file the Motion upon being granted leave to intervene.

8. However, Movants will only have standing to appeal the order if the Order is first set aside and the Movants are allowed to intervene; following which the Movants could state their objections

and the Court could either re-enter the same Order; dismiss the petition; or modify said Order as the conditions warrant. (*See Frazier v. McHaney*, 117 Ark. 419, 178 S.W.419, 420 (1915) "only those who were parties to the suit when the final decree was entered would have the right to prosecute an appeal.")

9. The Arkansas Rules of Civil Procedure, Rule 24, allows intervention of right when:

> [T]he applicant claims an interest relating to the property . . . which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Intervention as of right may not be denied. *See Schacht v. Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983).

10. The Movants clearly claim an interest in the property at issue herein as they are the shareholders of the Respondent Company which has now been placed in the hands of a receiver. The disposition of this action will not only impede their ability to protect their interest, it will completely abrogate it. Further, because the Receiver has no interest in protecting the interest of either Fewell or Holdingsco, their interest will not be adequately represented by the existing parties.

11. Fewell and Holdingsco should be allowed to Intervene and the Court should set aside its Order of July 11, 2000, allow Movants to voice their objections to the Petition, and consider the arguments of Movants regarding said Order. See Motion to Set Aside Permanent Injunction and To Dismiss, attached as Exhibit A. At that time, the Court could either re-enter the Order, dismiss the petition, or modify the Order accordingly. In any case, the aggrieved party would then be able to properly seek appellate review of the matter.

WHEREFORE, the Movants pray that they be allowed to intervene for purposes of protecting their property interests in Respondent; that the Order of July 11, 2000 be set aside and reconsidered; and for any and all other just and proper relief to which they may be entitled.

Respectfully Submitted,
/s/ Patrick R. James

EXHIBIT A TO THE MOTION WAS A MOTION AND BRIEF TO SET ASIDE PERMANENT INJUNCTION AND TO DISMISS

Come the Intervenors, Bob E. Fewell and Holdingsco, Inc., by and through their attorneys, Perroni & James, and for their Motion to Set Aside Permanent Injunction state as follows:

I. Procedural History

1. Intervenors are shareholders of Respondent.

2. On July 11, 2000, Petitioner moved for and obtained

an *ex parte* permanent injunction and an order appointing a receiver to rehabilitate Respondent.

3. One minute after the filing of the Petition herein, the Court granted the relief and entered a Permanent Injunction and ordered a receiver for rehabilitation of Respondent.

II. Interests of Intervenors

4. Intervenors were not made a party to the litigation although their interests will be materially affected by the ultimate outcome.

5. As the Receiver is now in control of the operations of Respondent, there is no one to either object to or prosecute an appeal of the Order entered against the Respondent, and ultimately against the interests of Intervenors.

6. By failing to name Intervenors as parties, the Petitioner has strategically and effectively blocked any such objection or appeal.

7. Intervenors have been granted leave to intervene for purposes of objecting and/or prosecuting an appeal of the July 11, 2000 Order granting a permanent injunction and appointing a receiver.

8. However, Intervenors will only have standing to appeal the order if the Order is first set and the Intervenors are allowed to intervene; following which the Intervenors could state their objections and the Court could either re-enter the same Order; dismiss the petition; or modify said Order as the conditions

warrant. (*See Frazier, et al. v. MeHaney*, 117 Ark. 419, 178 S.W.419, 420 (1915) "only those who were parties to the suit when the final decree was entered would have the right to prosecute an appeal.").

III. Motion to Dismiss

9. Petitioner moved for the appointment of a Receiver to take over the management and control of Respondent alleging that the Respondent was insolvent.

10. Petitioner further alleged that the Respondent agreed to the "entry of an order of permanent receivership without prior notice in the event of a breach of said Agreement and First Amended and Substituted Agreement."

11. Petitioner has materially breached the agreements it is relying upon.

12. Petitioner should not be allowed to enforce an agreement which it materially breached. *TXO Production Corp. v. Page*, 287 Ark. 304, 698 S.W.2d 791 (1985).

13. Interveners object to any such receivership and submit that Respondent and Interveners were coerced into signing the agreements.

14. Interveners respectfully submit that the Receivership be denied and that the Petition be dismissed.

15. The Order should be set aside in order to serve the interests of justice and to allow all those with interests to be properly included in the litigation. To deny

Intervenors their right to protect their property would surely be against the very system of advocacy and even-handedness upon which the judicial system is based. The Intervenors are entitled, in the least, to their day in Court.

16. This Court should set aside the Order and allow such proceedings as are necessary to properly protect all interests involved.

WHEREFORE, Intervenors pray that their Motion be granted, that the Order of July 11, 2000 granting a permanent injunction and appointing a Receiver for Rehabilitation be set aside; that the Petition be dismissed; and for any and all other just and proper relief to which they may be entitled.

Respectfully Submitted,
/s/ Patrick R. James

BRIEF IN SUPPORT OF MOTION TO SET ASIDE PERMANENT INJUNCTION AND TO DISMISS

I. Introduction

Movants respectfully submit that, as a matter of law, the Permanent Injunction and Order Appointing Receiver for Rehabilitation[1] should be set aside and the Petition for Appointment of Receiver should be dismissed.

In support of its Petition for Appointment of Receiver, the Petitioner relies upon two separate agreements, the first being dated May 28, 1999, and the second dated December 30, 1999. In reliance upon these agreements, the Petitioner contends that Respondent has agreed to the entry of an Order of Permanent Receivership without prior notice. As is set forth below, the actions of the Petitioner violated the agreements and were contrary to the terms of the agreements. Accordingly, as a matter of law, the Petition should be dismissed.

---

[1]Movants specifically reserve claims of misrepresentation to this Court by the Petitioner in connection with the Permanent Injunction and Order Appointing Receiver for Rehabilitation. The Petition and Order contain the specific representations that they are for the purpose of rehabilitation - not liquidation. Movants believe, and therefore allege, that the Petitioner never intended a rehabilitation and always intended a liquidation. Further, although Petitioner has only been granted authority for a rehabilitation, Petitioner is in the process of a liquidation and has no known plans for a rehabilitation. This is a material misrepresentation to the Court and exceeds the authority granted by this Court. However, it is not appropriate to litigate this issue in the context of a Motion to Dismiss.

II. Petitioner's Breach of Agreements

The May 28, 1999 Agreement, attached to the Petition as Exhibit B1, refers to a Consent Order dated April 30, 1999. Petitioner failed to attach the Consent Order as an exhibit. Therefore, it can provide no basis for the receivership. Further, Movants submit that even if the Order were attached it does not provide a basis for the relief requested. In any event, the Consent Order is not before this Court.

Paragraph 6 of the May 28, 1999 Agreement does contain a provision consenting to a receivership upon a breach of certain covenants. A review of the Petition establishes that in paragraph 3 the Petititioner is contending that the breach which occurred was the alleged failure of Movant to cure a deficiency. Petitioner's Exhibit A to the Petition further establishes that Petitioner contends the alleged breach was the failure of Movants to pay a $1.4 million claimed obligation as well as a $4.2 million claimed obligation.

The May 28, 1999 Agreement was modified pursuant to a First Amended and Substituted Agreement dated December 30, 1999, and attached to the Petition as Exhibit B2. On pages 3 and 4, the events triggering the payment of the alleged obligations are set forth. In short, they are based upon a "1999 Reserve True Up" calculation. This is a calculation based upon actual numbers, not estimated numbers.

While the Petitioner contends that there is a deficiency, there is no allegation that there was a 1999 Reserve True Up calculation. To the contrary, Petitioner attached as Exhibit B4 a calculation of claim reserves which

is a "estimate" and not a true up. The parties negotiated a true up actual calculation. This was a material term. The Petitioner is now relying upon an estimated calculation in violation of its own agreements which it seeks to enforce. *TXO Production Corp. v. Page*, 287 Ark. 304, 698 S.W.2d 791 (1985).

Accordingly, Petitioner illegally and improperly obtained its *ex parte*[2] Permanent Injunction and Order Appointing Receiver for Rehabilitation. Had counsel for Petitioner complied with his ethical obligations, there would have been notice and an opportunity to identify these issues before the Court prior to the entry of an injunction.

Further, without the alleged consent (which Petitioner violated) a permanent injunction could not and would not have been entered in its present form. Several procedural avenues would have been required, none of which have occurred to date.

Pursuant to Ark. Code Ann. § 23-68-104, the Commissioner must begin any delinquency proceedings against an insurer by: (1) applying to the court for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for[2]; (2) On the return of such order to show cause; (3) after a full hearing, the court

---

[2]Particularly disturbing is the fact that the Permanent Injunction and Order Appointing Receiver for Rehabilitation was obtained through an *ex parte* proceeding without notice to opposing counsel. The Petitioner's exhibits to its Petition (Exhibit A) clearly reflect that the Petitioner not only was aware of the existence of counsel, but had communicated with counsel. Despite this, Petitioner proceeded improperly on an *ex parte* basis. *See* MODEL RULES OF PROFESSIONAL CONDUCT 8.2 and 8.4 and ARKANSAS CODE OF JUDICIAL CONDUCT Canon 3.

shall (4) either deny the application or grant the application. Therefore, at a minimum, the Respondent is entitled not only to an opportunity to respond, but also a full hearing on the matter. *See* Ark. Code Ann. § 23-68-104.

III. Conclusion

For the foregoing reasons, Movants respectfully submit that the Permanent Injunction should be set aside and that the Petitioner's Petition should be dismissed.

Respectfully Submitted,
/s/ Patrick R. James

APPENDIX H

APPENDIX H

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SEVENTH DIVISION

MIKE PICKENS,
INSURANCE COMMISSIONER FOR
THE STATE OF ARKANSAS

PETITIONER

VS.

CIV 2000-5833

AMERICAN INVESTORS LIFE INSURANCE
COMPANY, AN ARKANSAS
DOMICILED COMPANY

RESPONDENT

ROBERT FEWELL AND HOLDINGSCO, INC.

INTERVENORS

RESPONSE TO MOTION TO INTERVENE & INCORPORATED BRIEF

(Filed August 4, 2000)

Comes now Mike Pickens, Insurance Commissioner for the State of Arkansas, in his capacity as receiver of American Investors Life Insurance Company, and for his response to the Motion to Intervene and Incorporated Brief filed herein by Bob E. Fewell and Holdingsco, Inc., states:

1. Petitioner admits that the movants are shareholders of Respondent.

2. Petitioner admits that, on July 11, 2000, he filed a Petition for the Appointment of Receiver which speaks for itself.

3. The Court granted the petition for the reasons set forth in its Permanent Injunction and Order Appointing Receiver for Rehabilitation.

4. In regard to the allegations of paragraph four of the motion, Petitioner states that, pursuant to the statutory provisions under which the receivership was obtained as well as the Agreement dated May 28, 1999 by which movants consented "to the immediate commencement and entry of an order granting receivership against the Company, "the movants were not necessary parties to the action.

5. Petitioner denies the allegations of paragraph 5 of the motion and states that there is no factual showing that the interests of the movants are not adequately protected.

6. Petitioner denies the allegations of paragraph 6 of the motion.

7. Petitioner denies that the motion attached to the motion to intervene has any factual or legal merit. No facts have been proved to support the relief requested and, on the contrary, the undisputed facts demonstrate that the July 11, 2000 order was properly entered. Notwithstanding the foregoing, the proposed motion is ineffectual to challenge the July 11, 2000 order as it fails to comply with Ark.R.Civ.P. 60(k).

8. In regard to the allegations of paragraph 8 of the motion to intervene, Petitioner denies the allegations and denies that the procedure which the movants have outlined would given them standing to appeal. *See* Ark.R.Civ.P. 60(k).

9. In regard to the allegations of paragraph 9 and 10, Petitioner denies that the interests of the movants are not protected by Petitioner or the Court in this receivership. Petitioner specifically denies that any proof has been presented which would substantiate the movants' conclusory allegations. Contrary to their assertions, the statutory receivership procedure allows for orderly administration of all claims and interests against the receivership estate. The movants have not demonstrated that the statutory procedure is inadequate.

10. Petitioner denies the allegations of paragraph 10.

WHEREFORE, Mike Pickens, Insurance Commissioner for the State of Arkansas, in his capacity as receiver of American Investors Life Insurance Company, prays that the motoin to intervene be denied and for all other proper relief to which he may be entitled.

/s/ William Waddell

APPENDIX I

APPENDIX I

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS
SEVENTH DIVISION

MIKE PICKENS,
INSURANCE COMMISSIONER FOR
THE STATE OF ARKANSAS

PETITIONER

VS.

CIV 2000-5833

AMERICAN INVESTORS LIFE INSURANCE
COMPANY, AN ARKANSAS
DOMICILED COMPANY

RESPONDENT

ROBERT FEWELL AND HOLDINGSCO, INC.

INTERVENORS

RESPONSE TO MOTION TO SET ASIDE PERMANENT INJUNCTION AND TO DISMISS

(Filed August 4, 2000)

Comes now Mike Pickens, Insurance Commissioner for the State of Arkansas, in his capacity as receiver of American Investors Life Insurance Company, and for his response to the Motion to Set Aside Permanent Injunction and to Dismiss[3] filed herein by Bob E. Fewell and Holdingsco, Inc., states:

1. Petitioner admits that the movants are shareholders of Respondent.

2. Petitioner admits that, on July 11, 2000, he filed a Petition for the Appointment of Receiver which speaks for itself.

3. The Court granted the petition for the reasons set forth in its Permanent Injunction and Order Appointing Receiver for Rehabilitation.

4. In regard to the allegations of paragraph 4 of the motion, Petitioner states that, pursuant to the statutory provisions under which the receivership was obtained as well as the Agreement dated May 28, 1999 by which movants consented "to the immediate commencement and entry of an order granting receivership against the Company," the movants were not necessary parties to the action.

5. In regard to the allegations of paragraph 5 of the motion, Petitioner admits that he is now in control of the operations of Respondent pursuant to the Court's order. Petitioner denies the remaining allegations of paragraph 5 of the motion.

6. Petitioner denies the allegations of paragraph 6 of the motion.

7. Petitioner admits that the Court has indicated it will grant the movants' motion to intervene.

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[3]Petitioner is filing this response as a precautionary measure and without prejudice to its argument that the motion has not actually been filed of record. To Petitioner's knowledge, the motion in question was only attached to the motion to intervene as an exhibit and has not been filed of record herein as an actual pleading.

8. Petitioner is without sufficient information to admit or deny the allegations of paragraph 8 and therefore denies the same.

9. In regard to the allegations of paragraph 9, Petitioner states that his petition speaks for itself.

10. In regard to the allegations of paragraph 10, Petitioner states that his petition speaks for itself.

11. Petitioner denies the allegations of paragraph 11 and states that the movants have neither offered nor introduced any proof to substantiate their allegations.

12. Petitioner denies the allegations of paragraph 12.

13. Petitioner denies the allegations of paragraph 13 and states that the movants have neither offered nor introduced any proof to substantiate their allegations.

14. Petitioner denies the allegations of paragraph 14 and states that the movants have neither offered nor introduced any proof to warrant dismissal of the receivership.

15. Petitioner denies the allegations of paragraph 15 and states that the movants have neither offered nor introduced any proof to warrant the relief requested.

16. Petitioner denies the allegations of paragraph 16 and states that the movants have neither offered nor introduced any proof to warrant the relief requested.

17. Pursuant to Ark.R.Civ.P.60(k), the proposed motion is ineffectual to challenge the July 11, 2000 order.

WHEREFORE, Mike Pickens, Insurance Commissioner for the State of Arkansas, in his capacity as receiver of American Investors Life Insurance Company, prays that the Motion to Set Aside Permanent Injunction and to Dismiss be denied and for all other proper relief to which he may be entitled.

/s/ William A. Waddell, Jr.

APPENDIX J

APPENDIX J

Arkansas Code Annotated § 23-68-101 provides:

(1) Subdivisions (2)-(13) inclusive of § 23-68-102, together with §§ 23-68-101, 23-68-104, 23-68-105, 23-68-113, and 23-68-115 - 23-68-120, constitute and may be referred to as the "Uniform Insurers Liquidation Act."

(2) The Uniform Insurers Liquidation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions when applicable conflict with other provisions of this chapter, the provisions of such act shall control.

Arkansas Code Annotated § 23-68-102 provides:

For the purpose of this chapter:

(1) "Impairment" or "insolvency". The capital of a stock insurer or the surplus of a mutual or reciprocal insurer shall be deemed to be impaired and the insurer shall be deemed to be insolvent when such insurer is not possessed of assets at least qual to all liabilities and required reserves together with its total issued and outstanding capital stock if a stock insurer, or the minimum surplus if a mutual or reciprocal insurer, required by this code to be maintained for the kind or kinds of insurance it is then authorized to transact.

(2) "Insurer" means any person, firm, corporation, association, or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilita-

tion, reorganization or conservation by the commissioner or the equivalent insurance supervisory official of another state.

(3) "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this chapter for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer.

(4) "State" means any state of the United States and also the District of Columbia and Puerto Rico.

(5) "Foreign country" means territory not in any state.

(6) "Domiciliary state" means the state in which an insurer is incorporated or organized, or in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States, and any such insurer is deemed to be domiciled in such state.

(7) "Ancillary state" means any state other than a domiciliary state.

(8) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of the Uniform Insurers Liquidation Act, as defined in § 23-68-101, are in force, including the provisions requiring that the commissioner of insurance or

equivalent insurance supervisory official be the receiver of a delinquent insurer.

(9) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and, as to such specifically encumbered property, the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders or all policyholders and creditors in the United States shall be deemed general assets.

(10) "Preferred claim" means any claim with respect to which the law of the state or of the United states accords priority of payments from the general assets of the insurer.

(11) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

(12) "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claim or claims against general assets. The term also includes claims which more than four (4) months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

(13) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

(14) "Hazardous financially" means the existence of any condition or the omission or commission of any act which would, in the reasonable discretion of the commissioner, seriously affect the advisability of an insurer's continued operation in this state or, as a result of its financial condition or other matters, would render the insurer's continued operation in this state perilous to the general public or to the policyholders or creditors of the insurer. The commissioner is authorized to promulgate regulations to set forth standards by which he might make a determination that the continued operation of an insurer might be hazardous financially.

Arkansas Code Annotated § 23-68-104 provides:

The commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers, or the public may require.

Supreme Court, U.S.
FILED
AUG
OFFICE OF THE CLERK

No. 01-192

IN THE

Supreme Court of the United States

BOB E. FEWELL & HOLDINGSCO, INC.,

Petitioners,

v.

MIKE PICKENS, INSURANCE COMMISSIONER FOR THE STATE OF ARKANSAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Mike Pickens, Insurance Commissioner for the State of Arkansas, petitioned the Pulaski County Circuit Court to place American Investors Life Insurance Company ("the Company") into receivership on July 11, 2000. Appendix F. The petition was filed only after Respondent worked with the Company for more than a year to cure its serious financial deficiencies. *Id.*, p. F-9. In addition, before filing the petition, Respondent's general counsel wrote Petitioners' counsel on June 30 and July 5, 2000 to ensure that Petitioners and the Company knew what action Respondent was about to take. *Id.*, pp. F-4 - F-8.

Respondent's petition was based upon two agreements reached among the Company, the Petitioners and the Respondent (*Id.*, pp. F-11 - F26) and the serious financial impairment of the Company. *Id.*, pp. F-2, F-4, F-9 - F-11. In support of his petition, Respondent attached the sworn affidavit of Mel Anderson, the Deputy Commissioner for Financial Regulation/Audit of the Arkansas Insurance Department. *Id.*, pp. F-8 - F-29.

Respondent's Deputy Receiver, Steve Uhrynowycz, and Anderson appeared before Judge John B. Plegge, Pulaski County Circuit Judge, and presented the petition and attached exhibits to the Court, including the sworn affidavit of Anderson. Uhrynowycz informed the court that demand letters for payment of the obligations under the parties' agreements had been sent and that Petitioner Robert Fewell's promissory note had not been paid and the Company's capital deficiency had not been cured. Uhrynowycz further informed the court that the failure to pay the promissory note and the failure to cure the capital deficiency constituted breaches of

the parties' agreements, in which event the Company and the Petitioners had consented to immediate entry of an order granting receivership and had waived prior notice of the entry of such an order. After asking questions of Uhrynowycz, the court asked for an order of receivership and then signed and filed the order. Appendix E.

The Permanent Injunction and Order Appointing Receiver (Appendix C) provided as follows in relevant part:

> In support thereof, the Court finds that Petitioner has made a prima facie case that Respondent's financial condition is impaired such that its continued operation outside the supervision of Petitioner will be hazardous to the general public, and to Respondent's insureds and creditors. The Court further finds that Respondent has consented to the entry of an order of permanent receivership without prior notice upon breach of covenants contained in May 28, 1999 Agreement and December 30, 1999 First Amended and Substituted Agreement, and that Petitioner has made a prima facie case of such breach of covenants.

Id., p. C-2.

The Petitioners moved to intervene and set aside the Permanent Injunction and Order Appointing Receiver and to dismiss the receivership. Appendix G. In his response to the motion to set aside the receivership order (Appendix I), Respondent denied each ground asserted by Petitioners for vacating the order and, with respect to each such ground, stated "that the movants have neither offered nor introduced any proof to substantiate their allegations." *Id.*, p. I-3.

On August 4, 2000, the court granted a hearing to the Petitioners on their motion to intervene and to dismiss the receivership. Although the Permanent Injunction and Order Appointing Receiver was premised upon the financial impairment of the Company, the failure of Petitioner Fewell to pay his promissory note, and the failure to cure the Company's capital deficiency, Petitioners argued only one issue at the August 4 hearing; *i.e.*, whether the obligation to cure the capital deficiency had accrued since they contended that no "true-up" number had been provided. Appendix E, pp. E-2 - E-3. Petitioners neither presented nor proffered any evidence to support any of the other allegations in their motion. The court denied Petitioners' request to set aside the receivership order. Appendix D.

The Arkansas Supreme Court affirmed the decisions of the trial court. Appendix A. The court agreed with Respondent that the trial court had considered the one argument made below by the Petitioners regarding the "true-up" calculation and had rejected it. *Id.*, p. A-10. In addition, the court noted that Petitioner Fewell had failed to pay his promissory note as required by the parties' agreements. *Id.* Based upon the foregoing, the court ruled the trial court correctly found that a breach of the parties' agreements had occurred. *Id.*, p. A-11.

The court then addressed the due process claim made by the Petitioners and held that Petitioners had "waived those statutory requirements under the Uniform Act by consenting to an *immediate* receivership in the event of breach without prior notice." *Id.*, p. A-13. The court concluded that the Petitioners' due process rights had not been violated and that the August 4, 2000 hearing provided them an opportunity to be heard on the legitimacy of the receivership order. *Id.*, p. A-14.

REASONS FOR DENYING THE WRIT

The Petitioners attempt to make a federal case of a state law decision based wholly upon their contractual waiver of notice before entry of an order of insurance receivership. Their first question for review completely ignores the contractual waiver by Petitioners and, instead, attempts to insert every constitutional buzzword into a twisted and misleading question in a transparent attempt to gain the Court's attention.

Their second question for review also ignores their contractual waiver of notice and their own failure to make arguments, much less present or proffer proof, at a hearing on August 4, 2000, which was granted by the trial court in response to their argument that they should have been given notice. Their characterization of the issue as whether the Due Process Clause "requires a meaningful opportunity to be heard on the issue of a domestic insurance company's right to contest" the company's placement into receivership is misleading when viewed in the context of the undisputed facts of this case.

Finally, this case is limited to its specific facts and is not likely to have far-reaching implications in insurance receiverships or other cases.

I.

THE PETITIONERS WAIVED NOTICE AND HAVE NO CONSTITUTIONAL ARGUMENTS

The Petitioners have not been denied any constitutional rights. By agreement with Respondent, Petitioners consented to an order of receivership and waived notice:

> However, upon breach of any one of the aforesaid covenants, the Company, the Parent and Fewell hereby agree and consent to the immediate commencement and entry of an order granting receivership against the Company by the Department under Ark. Code Ann. § 23-68-101 through § 23-68-132 and waive prior notice of entry of an order of permanent receivership.

Appendix F, pp. F-16 - F-17. Both the trial court and the Arkansas Supreme Court found breaches of the parties' agreement and, accordingly, ruled that Petitioners had consented to an order of receivership and had contractually waived any right to notice before the order of receivership was entered. Appendix A, p. A-13, Appendix C, p. C-2. Those holdings were proper in all respects and Respondent respectfully submits that there is no constitutional issue for review by this Court.

Respondent notes that due process varies according to the nature of the right and the type of proceedings. *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 33 (1976). Respondent does not concede that Petitioners had any due process rights as stockholders of the Company, particularly since Ark. Code Ann. § 23-68-105

provides that "the court may *without notice* issue an injunction restraining the insurer, its officers, directors, stockholders . . . and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court." Respondent's Appendix A (emphasis added).

More importantly, the Court has ruled that due process rights are subject to waiver by agreement. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). Petitioners have never, and do not in their petition to this Court, contend they could not waive any due process rights they might have.

Petitioners expressly state in their petition that they do not contend the Arkansas Uniform Insurers Liquidation Act is unconstitutional. *Petition for Writ of Certiorari*, p. 19. When coupled with their contractual waiver, that position eliminates any serious argument that their petition presents a constitutional issue for review by this Court. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (challenging the constitutionality of the prejudgment replevin laws of Florida and Pennsylvania).

II.

THE PETITIONERS WERE GIVEN AN OPPORTUNITY TO BE HEARD AND MADE ONLY ONE LIMITED ARGUMENT

Petitioners acknowledge that they were granted a hearing on August 4, 2000, but they contend that the hearing was not meaningful. If the hearing was not meaningful to Petitioners, it was due to their own failure to make arguments and either present or proffer proof.

Before the hearing on August 4, 2000, Petitioners filed a motion to intervene to which they attached a motion to dismiss. Appendix G, p. G-6. Petitioners made numerous substantive arguments in the motion, and Respondent denied each argument and stated that "the movants have neither offered nor introduced any proof to substantiate their allegations." Appendix I, p. I-3. Despite Petitioners' numerous arguments, they chose to argue only one issue at the August 4 hearing, (*i.e.*, whether a true-up calculation had been provided relative to their obligation to cure the Company's capital deficiency). Appendix E. They proffered no proof in support of that argument, and they apparently abandoned their other arguments.

Petitioners were the masters of their own fate at the August 4 hearing and had the opportunity to make any arguments they chose to make or to present or proffer any proof. Significantly, they chose to make the one argument and did not contest the serious financial impairment of the Company (Appendix C, p. C-2) or the failure of Petitioner Fewell to pay his promissory note as required by the parties' agreements. Appendix A, pp. A-10 - A-11.

No hearing is required in the situation where there is no factual dispute or the pleadings of a party do not raise an issue. *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882, 51 L. Ed. 2d 92 (1977). It follows that a party cannot claim it was denied due process when it failed even to make arguments, much less present or proffer proof, at a hearing granted at the party's request. Petitioners have certainly not demonstrated that they were prevented from making arguments or presenting proof, and Respondent respectfully submits that their argument must fail.

III.

THIS CASE IS LIMITED TO ITS FACTS AND WILL NOT HAVE FAR-REACHING IMPLICATIONS IN INSURANCE RECEIVERSHIPS OR IN OTHER CASES

Finally, this case is limited by its facts and will not have far-reaching implications in insurance receiverships or in other cases. It is obvious that this case involves the unique situation where an insurance company's primary stockholder (the Petitioner Holdingsco) and the owner of that stockholder (the Petitioner Fewell) negotiated an agreement to cure the financial impairment of the company and by consenting to an immediate order of receivership in the event they breached the agreement. Not only is this situation a rare occurrence, it is not likely ever to be repeated in light of the prejudice which the policyholders and creditors have experienced as a result of the Petitioners' continued efforts to frustrate and delay Respondent's attempts to have them paid.

In addition, it is significant that Petitioners plainly concede they are not challenging the constitutionality of the Arkansas Uniform Insurers Liquidation Act. *Petition for Writ of Certiorari*, p. 19. Rather, they argue only that, in the unique circumstances of this case, Respondent's actions left their constitutional rights "ignored and unprotected." *Id.* However, the undisputed facts and the holdings of the courts below demonstrate that Petitioners consented to Respondent's actions and, when Petitioners were given the opportunity to argue otherwise on August 4, 2000, they failed to show that Respondent acted improperly.

Respondent respectfully submits that this case is not susceptible of any broad constitutional ruling and will not have implications in insurance receiverships or in other cases involving state statutory schemes. The case is limited to its facts.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTE

Arkansas Code Annotated § 23-68-105 provides as follows in pertinent part:

> (1) Upon application by the commissioner for such an order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.
>
> (2) The court may at any time during a proceeding under this chapter issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.